(24,347)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 603.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EDWARD DETTLEBACH.

IN ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, STATE OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 5, 1915.

1 Recorded in Volume 943 and page 453.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas. App. Doc. 254.

128,886.

C. of A. No. 339.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corp., Defendant.

Money Only.

January Term, 1912.

Be it Remembered, that heretofore, to-wit: at a term of said Court of Common Pleas, begun and held at the Court House, in the City of Cleveland, within and for the County of Cuyahoga and State of Ohio, on the 8th day of January, in the year of our Lord, One thousand nine hundred and twelve, by and before their Honors: William A. Babcock, James Lawrence, Charles J. Estep, George L. Phillips, Henry B. Chapman, Clucas, W. Collister, Harvey R. Keeler, Willis Vickery, Simpson S. Ford, Martin A. Foran, William B. Neff, Thomas M. Kennedy, Judges of the Court of Common Pleas, of the Eleventh Judicial District of the State of Ohio.

And thereupon on the 29th day of March, A. D. 1912, there was duly filed in said Court of Common Pleas a certain Petition, in this cause, which is in the words and figures following to-wit:

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, a Corporation, Defendant.

Petition.

Now comes the plaintiff and represents that the defendant is incorporated as a railway company and is engaged in business as a

common carrier of freight and passengers, and also as a warehouseman; that on or about the 1st day of November, 1911, the plaintiff was the owner of certain household goods and merchandise consisting of rugs, blankets, shawls, clothing, etc., a particular description of which is shown on Exhibit "A" hereto attached and made a part hereof, which were then and there of the value of Twenty
2 Seven hundred and ninety-two dollars ($2792.00), and were in the possession of said defendant in its warehouse in Cleveland, Ohio, the defendant being then and there under obligations to safely keep and deliver the same to the plaintiff by reason of the following facts and circumstances; On the 18th day of September, 1911, such goods and merchandise, packed in three boxes with other articles, had been shipped from Denver, Colorado, over The Chicago, Burlington & Quincy Railway, being consigned to Mrs. E. Dettelbach, the wife of the plaintiff, at Cleveland, Ohio, and having been transported by said Chicago, Burlington & Quincy Railway, and other carriers, were delivered to the defendant and by it, in consideration of its freight charges, which were duly paid, carried to Cleveland, Ohio in good condition; that upon such arrival the defendant failed to give the plaintiff, or his wife, immediate notice thereof, and such goods and merchandise, without any fault of the plaintiff, remained in the possession of said defendant as warehouseman for a considerable time after such carriage had terminated.

Plaintiff further says that on or about the 1st day of November, 1911, by reason of the carelessness and negligence of said defendant in failing to safely keep and protect such property while so in its possession, the same was stolen from its warehouse, by reason of which, the plaintiff, without any fault on his part, sustained damages in the sum of Twenty-seven hundred and ninety-two dollars ($2792.00). On or about the 27th day of November, 1911, the plaintiff filed a written statement of his said claim with said defendant and demanded payment thereof, but the defendant has wholly failed and refused to pay the same and still refuses.

Wherefore plaintiff prays judgment against said defendant for the sum of Twenty-seven hundred and ninety-two dollars ($2792.00), with interest from November 1st, 1911.

EDWARD DETTELBACH,
By CARPENTER, YOUNG & STOCKER,
His Attorneys.

THE STATE OF OHIO,
Cuyahoga County, ss:

Edward Dettelbach, the said plaintiff, being first duly sworn, says that all the facts stated in the foregoing petition are true as he verily believes.

EDWARD DETTELBACH.

Sworn to before me and subscribed in my presence this 29th day of March, A. D. 1912.

[SEAL.]

C. C. YOUNG,
Notary Public.

Præcipe.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
3 THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, a Corporation, Defendant.

Precipe.

To the Clerk:

Issue summons upon the said defendant returnable according to law. Indorse same: "Action for Money Only". Amount claimed, $2792.00, with interest from November 1st, 1911. Carpenter, Young & Stocker, Attorneys for Plaintiff. Said copy of Account referred to in the foregoing petition as Exhibit "A" and made a part hereof, is in the words and figures following, to-wit:

EXHIBIT "A".

7 Navajo rugs	$1005.00
10 " blankets	1110.00
2 Mexican rugs	350.00
4 Woolen blankets	28.00
2 Mexican Shawls	70.00
10 Sheets	10.00
1 Bolt of white silk	75.00
1 Collarette and Muff	50.00
1 Collarette, white	25.00
1 Pair Pillows	10.00
1 Overcoat	45.00
Piano Cover	2.50
2 Bed Spreads	4.00
3 Comforts	7 50
Total	$2792.00

Said Petition is endorsed as follows, to-wit: No. 128886. Edward Dettelbach, Plaintiff, vs. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a Corporation, Defendant. Petition. Carpenter, Young & Stocker, Attorneys for Plaintiff.

Summons Issued.

And thereupon on the 29th day of March, A. D. 1912, there was duly issued from said Court of Common Pleas a certain Summons, in this cause, which is in the words and figures following, to-wit:

THE STATE OF OHIO,
Cuyahoga County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify The Cleveland, Cincinnati, Chicago and St. Louis Railway Company that it has been sued by Edward Dettelbach in the Court of Common Pleas of Cuyahoga
4 County, and that unless it answer by the 27th day of April, A. D. 1912 the petition of the said plaintiff against it filed in the Clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on the 8th day of April, A. D. 1912.

Witness, Charles S. Horner, Clerk of said Court, and the seal thereof, at the City of Cleveland, this 29th day of March, A. D. 1912.

CHARLES S. HORNER, *Clerk.*
By H. L. NICHOLAS, [SEAL.]
Deputy Clerk.

Said Summons is endorsed as follows, to-wit: No. 128,886. Cuyahoga Common Pleas. Edward Dettelbach, vs. The C. C. C. & St. L. Ry. Co. Summons in Action for the Recovery of Money Only. Amount claimed $2792.00 for which with interest from the 1st day of Nov. 1911, judgment will be taken if you fail to answer. Returnable April 8, 1912. Carpenter, Young & Stocker, Plaintiff's attorney.

Summons Returned.

And thereupon on the 8th day of April, A. D. 1912, came the Sheriff of Cuyahoga County, who duly returned and filed said Summons, with his return thereon, endorsed as follows, to-wit:

THE STATE OF OHIO,
Cuyahoga County, ss:

On the 5th day of April, 1912, I served this writ on the within named The Cleveland, Cincinnati, Chicago and St. Louis Railway Co., by leaving a true and certified copy thereof with all the endorsements thereon at the usual place of business of said company with E. L. De Neck, chief clerk in charge of the business of said company, the president or other officer not found in my county.

A. J. NIRSTIUS, *Sheriff,*
By E. H. STEGKEMPER, *Deputy.*

(Sheriff's fees $.91.)

And thereupon on the 23rd day of April, A. D. 1912, there was duly filed in said Court of Common Pleas a certain Motion, in this cause, which is in the words and figures following to-wit:

Motion.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, a Corporation, Defendant.

Motion.

Comes now defendant and moves the court to require plaintiff herein to make his petition more definite and certain in the following particulars, to-wit: that he set forth in what manner defendant was negligent "in failing to safely keep and protect such property while so in its possession."

COOK, McGOWAN & FOOTE,
Attorneys for Defendant.

Notice.

We acknowledge service of notice of the above motion by copy this 20th day of April, 1912, and that the same will be for hearing in Court Room No. 1, on the 24th day of April, 1912, at 9:30 o'clock A. M., or as soon thereafter as the Court will hear the same.

CARPENTER, YOUNG & STOCKER,
Attorneys for Plaintiff.

Said Motion is endorsed as follows, to-wit: In the Court of Common Pleas. No. 128,886. Edward Dettelbach, Plaintiff, vs. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a corporation, Defendant. Motion. Cook, McGowan & Foote, Attorneys for Defendant.

And thereupon on the 2nd day of May, A. D. 1912, it being a day of the April Term, A. D. 1912, of said Court, there was duly entered upon the journal the following order, to-wit:

The motion to require the plaintiff to make his petition definite and certain, is heard and refused, at the defendant's costs, for which judgment is rendered against it. To which ruling the defendant excepts.

And thereupon on the 8th day of May, A. D. 1912, there was duly filed in said Court of Common Pleas a certain Answer, in this cause, which is in the words and figures following, to-wit:

Answer.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

First Defense.

Comes now defendant and for its answer herein admits it is incorporated as a railroad company and is engaged in business as a common carrier of freight and passengers, and in connection therewith acts as a warehouseman; that on or about the 18th day of September, 1911, certain articles described as household goods were shipped from Denver, Colorado, by The Chicago, Burlington & Quincy Railway and consigned to Mrs. E. Dettelbach, Cleveland, Ohio; that said goods were transported to Cleveland, Ohio, and, the Consignee thereof having failed, upon notice given to remove the same, remained in the possession of defendant as warehouseman. Further answering defendant denies each and every the allegations in the petition contained except such as are herein specifically admitted.

Second Defense.

For a second and further defense to the matters and things contained in the petition herein defendant says, that on or about the 18th day of September, 1911, The Chicago, Burlington &
6 Quincy Railway Company received at Denver, Colorado, from Langton Brothers, who were then and there acting as agents for the Consignee and the owner thereof, three boxes, described as household goods, said articles being consigned to Mrs. E. Dettelbach, Cleveland, Ohio; said articles being received for shipment by said Railway Company from said station over the line of its railroad and that of its connecting carriers to said city of Cleveland, State of Ohio, all under and pursuant to the terms and conditions of a certain bill of lading or contract then and there issued by said Railway Company; that in said contract it was provided in substance that said goods were received by said railway company subject to the classifications and tariffs then in force and effect; that it was mutually agreed as to each carrier of all or any of said property and as to each party at any time interested in all or any of said property, that every service to be performed under said contract should be subject to all the conditions contained therein, which were then and there agreed to by the shipper of said articles and accepted for himself, themselves and his or their assigns.

This defendant further says that at the time of the delivery of

said articles to said Railway Company the shipper thereof, acting for himself and his assigns and for the owner and consignee thereof, then and there voluntarily declared that the valuation of said articles shipped under said contract did not exceed the sum of Ten Dollars ($10.00) per one hundred pounds, and requested said Railway Company to transport said articles under the tariffs and classifications then in force providing for rates of freight based upon such valuation.

Defendant further says that said shipper had the option of shipping said property at a higher rate without any limitation as to value in case of loss or damage from causes which would make the carrier liable, but then and there agreed to said valuation of $10.00 per one hundred pounds for the purpose of securing a lower rate of freight thereby accorded for such transportation; that the amount of freight which the shipper then elected to pay for the transportation of said goods was at the reduced rate and based upon
7 said voluntary agreed limitation of value for said articles to the sum of $10.00 per one hundred pounds as provided and set forth in said contract.

Defendant further says that the said The Chicago, Burlington & Quincy Railway Company at the time of the shipment of the articles in question and this defendant had duly published and on file with the Interstate Commerce Commission at the City of Washington, D. C., their certain classifications of freight and tariffs of freight rates for the transportation thereof between said City of Denver, in the State of Colorado, and the City of Cleveland in the State of Ohio, and that said classifications and tariffs were on file at the office of the said The Chicago, Burlington & Quincy Railway Company at its station in the City of Denver, Colorado, where said articles were by it received for transportation for the inspection and information of said shipper and the public generally; that in said classifications it was provided that shipments of household goods, if shipped at a valuation expressed by the consignor, not exceeding the sum of Ten Dollars ($10.00) per one hundred pounds might be made at the rate of freight provided for first-class shipments in less than car load lots, in which event said consignor agreed to the specific valuation of $10.00 per one hundred pounds in the case of loss or damage from causes which would make the carrier liable; that the shipment of said goods with such agreed limitation of value was optional with the shipper thereof and said goods could be shipped without such limitation of value at a higher rate of freight. This defendant says that to permit plaintiff to recover of defendant for any loss of said household goods upon a higher valuation than that agreed upon in said contract would be in violation of the Act of Congress entitled An Act to regulate Commerce, passed February 4, 1887, and the various amendments thereto, and commonly known as the Interstate Commerce Act, and that if any loss occurred to any part of said household goods any recovery beyond said valuation of ten dollars per one hundred pounds agreed to in said contract is prohibited by said Act of Congress above set forth, and this

defendant is also prohibited by the provisions of said Act from the payment to plaintiff of any sum in excess of said ten dollars
8 per one hundred pounds. And this defendant further says that the right of this defendant to make such classifications and rates of freight based thereon, as hereinbefore set forth, has been approved by the Interstate Commerce Commission appointed under the provisions of said Act of Congress as well as by the opinions of the Supreme Court of the United States, and that to permit plaintiff to recover any sum in excess of said agreed valuation of ten dollars per one hundred pounds would be in violation of said Act of Congress as construed and approved by said Interstate Commerce Commission and the Courts of the United States.

Defendant further says that by reason of the premises plaintiff is not entitled to recover of it in any event any amount in excess of the sum of Ten dollars ($10.00) per one hundred pounds for any articles shipped under said contract. Wherefore defendant prays to be hence dismissed with its costs.

COOK, McGOWAN & FOOTE.

STATE OF OHIO,
Cuyahoga County, ss:

E. A. Foote, being first duly sworn, says that he is one of the attorneys for the above named answering defendant, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, duly authorized to verify this pleading; that the facts stated and allegations contained in the foregoing answer are true as he verily believes.

E. A. FOOTE.

Sworn to before me and subscribed in my presence by said affiant this 8th day of May, 1912.

M. R. DICKEY, JR., [SEAL.]
Notary Public.

Tax fee 40¢.

Said Answer is endorsed as follows, to-wit: No. 128,886. Cuyahoga Court of Common Pleas. Edward Dettelbach, vs. The Cleveland, Cincinnati, Chicago & St. Louis, Railway Company, Defendant. Answer. Cook, McGowan & Foote, Attorneys for Defendant.

And thereupon on the 16th, day of July, A. D. 1912, there was duly filed in said Court of Common Pleas a certain Demurrer, in this cause, which is in the words and figures following, to-wit:

Demurrer.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

Demurrer to Answer.

Now comes the plaintiff and demurs to the second defense contained in the answer of the defendant filed herein for the
9 reason that the same is insufficient in law and upon its face.

EDWARD DETTELBACH,
By CARPENTER, YOUNG & STOCKER,
His Attorneys.

Notice.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

The defendant will take notice that the plaintiff has this day filed his demurrer to the second defense contained in defendant's answer, and that the same will be for hearing in Court Room No. One in its regular order.

CARPENTER, YOUNG & STOCKER,
Attys. for Plaintiff.

Service of the above notice by copy is hereby acknowledged this 16th day of July, A. D. 1912.

COOK, McGOWAN & FOOTE,
Attys. for Defendant.

Said Demurrer is endorsed as follows, to-wit: #128,886. Edward Dettelbach, Plaintiff, vs. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant. Demurrer to Answer. Carpenter, Young & Stocker, Attorneys for Plaintiff.

And thereupon on the 26th day of September, A. D. 1912, it being a day of the September Term, A. D. 1912, of said Court, there was duly entered upon the journal the following order, to-wit: The demurrer to the answer, is heard and overruled, at the plaintiff's costs, for which judgment is rendered against him. To which ruling the plaintiff excepts.

And thereupon on the 8th day of February, A. D. 1913, there was duly filed in said Court of Common Pleas a certain Reply, in this cause, which is in the words and figures following, to-wit:

Reply.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

EDWARD DETTELBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

Now comes the plaintiff and for reply to the second defense contained in the answer of the defendant, admits that plaintiff's goods were shipped by Langton Brothers from Denver, Colorado, over The Chicago, Burlington & Quincy Railroad, and that in the certain bill of lading or contract issued by said company was written the stipulation relating to the value of said articles substantially in the form set forth in defendant's answer, but plaintiff denies all other allegations in said second defense contained and repeats the prayer of his petition.

CARPENTER, YOUNG & STOCKER,
Attorneys for Plaintiff.

THE STATE OF OHIO,
Cuyahoga County, ss:

10 Edward Dettelbach, being first duly sworn, says that all of the allegations contained in his foregoing reply are true as he verily believes.

EDWARD DETTELBACH.

Sworn to before me, and subscribed in my presence this 7th day of February, A. D. 1913.

C. C. YOUNG, [SEAL.]
Notary Public.

Said Reply is endorsed as follows, to-wit: #128,886. Edward Dettelbach, Plaintiff vs. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant. Reply. Carpenter, Young & Stocker, Attorneys for Plaintiff.

And thereupon on the 14th day of March, A. D. 1913, it being a day of the January Term, A. D. 1913, of said Court, there was duly entered upon the journal the following order to-wit: On the application of the plaintiff, this cause is continued to the next term of this court, at his costs, for which judgment is rendered against him.

And thereupon on the 11th day of June, A. D. 1913, it being a day of the April Term, A. D. 1913, of said Court, there was duly entered upon the journal the following order, to-wit: The parties come and a jury is duly impaneled and sworn, who after due trial, "do find for the plaintiff and assess his damages in the sum of $3029.82 Three Thousand and Twenty Nine and 82/100 Dollars."

And thereupon on the 12th day of June, A. D. 1913, there was duly filed in said Court of Common Pleas a certain Motion, in this cause, which is in the words and figures following, to-wit:

Motion for New Trial.

THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Common Pleas.

128,886.

EDWARD DETTLEBACH, Plaintiff,
vs.
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Defendant.

Comes now defendant and moves the court to set aside the verdict heretofore rendered herein and grant a new trial on the following causes to-wit: 1. Said verdict is contrary to law. 2. Said verdict is not sustained by sufficient evidence and is against the weight of the evidence. 3. Said court erred in admitting testimony offered by plaintiff over the objection of defendant to which it at the time excepted. 4. Said court erred in refusing to admit testimony offered by defendant to which refusal defendant at the time excepted. 5. Said court erred in overruling the motion of defendant to
11 direct a verdict for it made at the conclusion of all the testimony. 6. Said court erred in refusing to give to the jury before argument, instructions Nos. 1 and 2 as requested by defendant in writing at the conclusion of all the testimony and before arguments to the jury. 7. Said court erred in refusing to instruct the jury as requested by defendant after the argument in its request No. 1. 8. Said court erred in its charges to the jury. 9. Said verdict is, and to permit plaintiff to recover would be, in violation of the constitution of the United States and particularly article

1, section 10 thereof, by impairing the contract rights of defendant and would also be for the same reason in violation of the constitution of the State of Ohio and particularly article 2, section 28 thereof. 10. Said verdict is, and to permit plaintiff to recover would be, in violation of the act of congress entitled, "An Act to Regulate Commerce," February 4, 1887, with the various amendments thereto and commonly known as "The Interstate Commerce Act." 11. The amount of said verdict is too large. 12. For other errors of law occurring during the trial and excepted to at the time by defendant.

COOK, McGOWAN & FOOTE,
Attorneys for Defendant.

Said motion is endorsed as follows, to-wit: 128,886. In the Court of Common Pleas. State of Ohio, Cuyahoga County, ss. Edward Dettelbach, Plaintiff, vs. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Defendant. Motion for New Trial. Cook, McGowan & Foote, Attorneys for Defendant.

And thereupon on the 27th day of June, A. D. 1913, it being a day of the April Term, A. D. 1913, of said Court, there was duly entered upon the journal the following order, to-wit: The motion of the defendant for a new trial of this cause, is heard and refused. To which ruling the defendant excepts. It is therefore considered that said plaintiff recover of said defendant his said damages and also his costs of this suit. Judgment is rendered against the defendant for its costs herein.

Bill of Exceptions.

And thereupon on the 5th day of August, A. D. 1913, there was duly filed in said Court of Common Pleas a certain Bill of Exceptions, in this cause.

Notice issued (Missing).

And thereupon on the 5th day of August, A. D. 1913, there was duly issued from said Court of Common Pleas a certain
12 Notice, in this cause, which notice is missing from the files.

Notice Returned.

And thereupon on the 8th day of August, A. D. 1913, came the sheriff of Cuyahoga county, who duly returned and filed said Notice, with his return thereon, endorsed as follows, to-wit: (return copied from the Appearance Docket).

Notice Bill of Exceptions ret'd endorsed: on the 6th day of Aug. 1913, I served this notice on the within named Edward Dettelbach, by delivering a true and certified copy thereof to C. C. Young of

the firm of Carpenter, Young & Stocker, att'ys *or* record for said Edward Dettelbach.
(Sheriff's fees $.91).

Bill of Exceptions Transmitted.

And thereupon on the 23rd day of August, A. D. 1913, said Bill of Exceptions was duly transmitted to the trial Judge.

Bill of Exceptions Received.

And thereupon on the 26th day of August, A. D. 1913, said Bill of Exceptions was duly received from the trial Judge.

And thereupon on the 12th day of February, A. D. 1914, it being a day of the January Term, A. D. 1914, of said court, there was duly entered upon the journal the following order, to-wit: And thereupon on the 11th day of February, A. D. 1914, there was duly filed with the Clerk of this court a certain mandate from the Court of Appeals, in this cause, which is as follows, to-wit:

Mandate.

13 "Court of Appeals of Ohio, Eighth District, Cuyahoga County, January Term, A. D. 1914.

THE C., C., C. & ST. L. RY. CO.
vs.
EDWARD DETTELBACH.

Error to Common Pleas.

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error his costs herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution.
To all of which the plaintiff in error excepts.

I, Edmund B. Haserodt, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court, at Cleveland, this 9th day of February, A. D. 1914.

EDMUND B. HASERODT, *Clerk*,
By R. E. MOLLENKOPF, *Deputy*. [SEAL.]

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

To the Honorable Court of Common Pleas in and for the County of Cuyahoga, Greeting:

You are hereby Commanded, that, without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness Edmund B. Haserodt, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this 9th day of February, A. D. 1914.

EDMUND B. HASERODT, *Clerk*,
By R. E. MOLLENKOPF, *Deputy*. [SEAL]."

Attest:
EDMUND B. HASERODT, *Clerk*.
By R. E. MOLLENKOPF, *Deputy*.

Plaintiff's costs are taxed at $31.31.
Defendant's costs are taxed at $2.85.

14 *Defendant's Bill of Exceptions.*

Be it remembered, that on the 9th day of June, A. D. 1913 being a day in the April 1913 Term of said court, this cause came on for hearing before Honorable C. J. Estep, one of the Judges of said court, and a jury, and the following proceedings were had:

Appearances:

Carpenter, Young & Stocker, on behalf of the plaintiff.
Cook, McGowan & Foote, on behalf of the defendant.

Whereupon to maintain the issues on his part, the plaintiff, EDWARD DETTELBACH, offered himself as a witness, and being first duly sworn, testified as follows:

Direct examination.

By Mr. YOUNG:

Q. Your name is Edward Dettelbach?
A. Yes, sir.
Q. And you are the plaintiff in this case, that is you brought this suit against the railroad company?
A. Yes, sir.
Q. And what is your present employment?
A. 1220 West 9th, fireman.

Q. And what is your regular work?
A. Iron moulder.
Q. And before 1911, you may tell where you were located?
A. 1200 West 9th.
Q. What city?
A. Cleveland, Ohio.
Q. And in September, 1911, you were here then. Well, back of that, where had you lived, Mr. Dettelbach?
A. Down in Mexico.
Q. And you may state what are the facts in regard to your being the owner of some rugs and blankets and other property?

Objected to. Question withdrawn.

Q. You may state, Mr. Dettelbach, what if anything, you did in regard to packing and boxing household goods in the City of Denver, Colorado, while you were there?
A. I boxed and stored this box of blankets with some furniture at Langton Brothers in North Denver, Colorado.
Q. When was that?
A. In 1909.
Q. And after you had done that what did you do?
A. I left Denver and came to Cleveland.
Q. You have been here ever since?
A. Yes, sir.
Q. Was your wife living in Denver at that time?
A. Yes, sir.
Q. And did you break up housekeeping at that time?
A. I broke up house and they stayed there two years after I left.
Q. Who do you mean by "they?"
A. My wife and daughter.
Q. And you had in your house, I suppose, the regular household furniture, and you stored all of your furniture, did you, with Langton Brothers?
A. All of my furniture with Langton Brothers.
Q. Now, tell particularly about this one box you mentioned?
A. Why, this one box I had had Navajo blankets and a small bolt of silk, of white silk, Mexican silk, and two shawls; I think there were nineteen blankets, some of them—there was one of them at least worth $300.00 or more.

To which answer the defendant objected and moved to strike out the same.

The COURT: You were not asked about the value; that may be stricken out.

Q. Describe first, tell the jury the description of these blankets?
A. The blankets were all white with border, some had centers; some was blankets and others they would use as rugs; the heavier ones they would use as rugs and the lighter ones is finer; they would use them on the bed, but they could use them either way. These blankets take about two weeks to make down in Mexico and around the Navajo reservation down there they make them. I bought these

blankets down there, I guess about fifteen years ago, picked
16 them up off and on for fifteen years. Mexican shawls are made on the same principal only they are made real fine and the silk here I suppose is something like Chinese silk, Mexican silk is very fine, about sixty yards in that bolt, somewhere around there.

Q. And you may describe the box in which you placed the merchandise and tell the jury how you fastened it?

A. This box was about four feet, four foot six, maybe might have been five foot square, about three feet high, and it was fastened with iron, just a clamp of iron all the way around it, and sent into and laid in the warehouse and under all the furniture. This box was the first thing taken off the wagon and put in the vault.

Mr. FOOTE: You mean when you put it in, in 1909?
The WITNESS: In Denver, yes, in 1909.

Q. When did you see it last?
A. In 1909.
Q. And where was it?
A. Denver, Colorado.
Q. And in what place?
A. In the storage.
Q. And whose storage?
A. Langton Brothers.

Q. What arrangement, if any, did you have with Langton Brothers in regard to your household goods?

A. Why, I paid them every month to keep it there until I send for it or dispose of it.

Q. And personally you have no knowledge of what happened to this box after you had so packed it and deposited it in the warehouse of Langton Brothers?

A. It is impossible for anybody to touch it.

Mr. FOOTE: Ask to have that stricken out.
The COURT: Stricken out.
Question withdrawn.

Q. You said that you saw the box last when it was in the warehouse of Langton Brothers, in 1909?

A. I was there and helped them take it off, that is the last I seen it.

Q. Now, more particularly, Mr. Dettelbach, how would you describe these rugs and blankets as to being Mexican or as to their manufacture?

A. A Mexican rug is not worth as much what a Navajo is because they are not as fine knitted.

Q. And will you tell the size of these, take up the Navajo
17 rugs?

A. Well, the Navajo rugs——

Q. Tell the size.

A. Some of them run five feet square, others run six feet, and there are some seven and eight feet long, five feet wide; they are different in width and different in length, according to the price of

them. You take the one that I paid $300.00 for, that is about eight feet long, about seven feet wide.

Q. Well, you may state the value of these rugs and blankets?

To which question the defendant objected.

The COURT: Yes, I think unless he has shown some qualification to express the value, I don't know whether they have a market value or not, I suppose they do.

Q. Well, we will go into that; what experience Mr. Dettelbach, if any, have you had in buying and selling rugs and blankets of this kind?

A. Oh, I have bought and sold them down there for the last eighteen or twenty years, have bought off and on and sold them.

Q. Well, do you have the means of knowing what these goods were worth in the City of Cleveland in the year 1911, in November?

Mr. FOOTE: Just a minute——

The COURT: Fair market value.

A. Well, here I couldn't tell.

Mr. FOOTE: Object to it because under the terms of the bill of lading the amount of any loss or damage for which any carrier is liable should be given on the basis of the value of the property placed at the time of shipment.

Question withdrawn.

Mr. YOUNG: Before proceeding with Mr. Dettelbach, by the consent of the Mr. Foote, I would like to introduce a driver who was here this morning.

The COURT: All right.

(Witness withdrawn temporarily.)

Whereupon, further to maintain the issues on his part the plaintiff called as witness, FREDERICK PLOTZ, who being first duly
18 sworn, testified as follows:

Direct examination.

By Mr. YOUNG:

Q. What is your name?

A. Frederick Plotz.

Q. What is your business?

A. Teamster.

Q. And in 1911 what firm were you with?

A. Fireproof Storage Company.

Q. In November, 1911, you may state whether or not you went to the Big Four freight depot for some goods for Mr. Dettelbach?

A. Two boxes household goods.

Q. I call your attention to a bill of lading dated September 18-1911, which has been attached to a deposition in this case and I will ask you if you recognize that document?

Said document is marked "Plaintiff's Exhibit 1".

A. Yes, sir, this is the one.
Q. From whom did you obtain that document?
A. From Mr. Dettelbach.
Q. And what did you do with it?
A. Took it down to the depot.
Q. And what did you do there, Mr. Plotz?
A. Took it in to the cashier.
Q. And then what did you do?
A. Got a duplicate.
Q. And what next?
A. I went out and got the goods.
Q. What goods did you get?
A. I got two boxes of household goods.
Q. What about the third box?
A. The third box was missing.
Q. Where were these two boxes found?
A. In the stray pile.
Q. On what floor?
A. First floor in the depot.
Q. This is the depot down on Front Street?
A. Yes, sir.
19 Q. The large main depot there?
A. Main Depot Front Street.
Q. Give the jury a description of these two boxes that you did get?
A. Two boxes that I got was about that length (indicating two feet by two feet).
Q. Can you tell in feet?
A. Well, one was about two and one half feet by three feet high and the other one was about two feet by two and a half feet, and both lids were broken off.
Q. In what way?
A. The top was off the boxes.
Q. And to what extent?
A. Why, they were just opened up; just like as if they had been ransacked, the both of them.

Mr. FOOTE: Object to that.
Latter part of answer stricken out.

Q. You may state whether or not you saw, if anything, the contents of those boxes or either of them?
A. No, sir, I didn't see the contents of either of them.
Q. What was the weight of those boxes?
A. One weighed about 130 and the other about 135.
Q. And what did you do with them?
A. I delivered them to Mr. Dettelbach's house.
Q. Home?
A. Yes, sir.
Q. Where was that?
A. Ninetieth Street.
Q. And what street was it near?
A. Superior Street.

Q. Ninetieth and Superior?
A. Ninetieth and Superior.
Q. I ask you to look at this freight bill which I hand you, which may be marked "Plaintiff's Exhibit 2", and I ask you if you recognize that document?
A. Yes, sir, I do.
Q. When, if at all, did it come into your possession?
A. I got it November 6th when I called there.
Q. From whom?
A. From the cashier down at the depot—Allen.
Q. You didn't pay any freight, however?
A. No sir, I did not.
Q. And on what day was it then, that you got these two boxes for Dettelbach?
A. I got the two of them on November 6th.
Q. What year?
A. 1911.
Q. Before that time, Mr. Plotz, had you been engaged in teaming for a considerable time?
A. Yes, sir, I have.
Q. Had you often been to this warehouse of the Big Four Railroad?
A. Yes, sir, I had.
Q. And do you know a man there by the name of A. Andrews?
A. I know Mr. Andrews, yes sir.
Q. Whereabouts at the freight office does he have his office?
A. Upstairs, main office.
Q. What does he do?

Mr. FOOTE: Object unless he knows.
The COURT: Of course, if he doesn't know, he wouldn't probably——
Mr. YOUNG: Rather preliminary.
The COURT: He may answer.

Q. What does Mr. Andrews do?
A. He looks after all the shortages.
Q. What do you mean by that?
A. Looks after the freight missing and so on, stray freight.

Whereupon counsel for defendant asked to have the answer stricken out and withdrawn from the consideration of the jury, which motion was overruled by the court, to which ruling of the court the defendant then and there duly excepted.

Q. Describe Mr. Andrews' appearance?
A. Mr. Andrews is a gray headed man.
Q. State whether or not he wears glasses?
A. He wears glasses.
Q. About how many years have you known him as being connected with this——
A. I know him five years.

21 Cross-examination.

By Mr. FOOTE:

Q. He is in the agent's office upstairs?
A. Yes, sir, upstairs.

Whereupon further to maintain the issues on his part, the plaintiff EDWARD DETTELBACH, re-offered himself as a witness, and having been previously sworn, testified as follows:

Further direct examination.

By Mr. YOUNG:

Q. Mr. Dettelbach, I asked you yesterday before the adjournment, in regard to the value of these Mexican and Indian rugs and blankets and you may state again to what extent you have bought and sold this class of articles?

Mr. FOOTE: Object, I objected last night.

The COURT: I think though, probably I will let it go in under further consideration; I am not clear—the rule on it at this time. I will have to hear you further so I will let the value go into the record.

Q. I will ask you, Mr. Dettelbach, to tell further what experience you have had in buying and selling this class of property?

A. Well, I could get more here than I could in Denver, because a man in Denver——

Mr. FOOTE: Ask to have that stricken out.

The COURT: Stricken out, he is asking what experience you have had.

The WITNESS: Well, I have made a business of buying and selling; when I get a man that I thought would buy I would show them to him; generally all through the southwest, and when I would come up there to Denver or Pueblo and could interest a New York or eastern man I would get more for a blanket than I would in Denver or Pueblo.

Latter part of answer stricken out.

22 Q. During how many years have you continued in this line of buying and selling, at times, this class of property?

A. Oh, probably for eighteen years off and on in there.

Q. Now, are you in a position to state the value of these Navajo rugs and blankets which were in the big box referred to, in the year 1911?

Objected to. Question withdrawn.

Q. I will ask you whether or not these goods had a market value, so far as you know?

A. Oh, yes.

Q. Where did they have a market value?

A. In Denver or here.

Q. And in 1911, do you know what the value of these goods was in the City of Denver, without saying what it was?

A. Yes, sir.

Q. And did you also know what the value of the goods was in the City of Cleveland, without stating what it was?

A. Well, I expected to get more here than I would there.

The COURT: Do you know?

The WITNESS: Yes, I know. I am sure I could get it here. I am positive.

Answer stricken out.

The COURT: He is asking you if you know the value here or not the market value?

The WITNESS: I think I do.

Q. You may state what the value of those rugs and blankets was in the year 1911 at Cleveland Ohio?

To which question the defendant objected, which objection was overruled by the court, to which ruling of the court the defendant then and there duly excepted.

A. Well, there was so many there, one of them at least was worth $300.00 of any man's money.

Q. Go right through the list: have you got a list of those or in your mind?

A. I have got them kind of in mind, that is all: they run from $130.00 to $300.00, $135.00: some of them cost me $140.00.

Q. Have you got a list there?

The COURT: Here is the petition if this is correct.

Q. Take the petition then, Mr. Dettelbach: now, you state
23 the different articles and the value of them?

A. Navajo blankets.

The COURT: How many?

The WITNESS: Seven Navajo rugs, they are used for rugs or blankets.

Q. What are they worth?

A. These are worth from $130.00 to $135.00 a piece: two Mexican rugs and Mexican rug is worth about $175.00.

The COURT: Each?

The WITNESS: Yes, sir.

Q. Proceed.

A. Four woolen blankets, they were common woolen blankets, the same as you buy here.

Q. What were they worth?

A. Oh, probably $7.00 or $8.00 apiece, two Mexican shawls they cost me $35.00 apiece, they are worth the money. You just want the rugs and blankets?

Mr. FOOTE: We want what was in this box.

A. There was one bolt of white silk, $75.00.

Q. Go ahead?

A. There is some more to this, there was more blankets than that.

The COURT: Well, that is all you are sueing for.

A. (continued). One of those blankets cost me $300.00; one blanket and Navajo rug that cost me $300.00.

Mr. FOOTE: One of these seven, you mean?

The WITNESS: One of these nineteen; then there is ten blankets here; those blankets run from $135.00 to $140.00.

Mr. FOOTE: You mean those ten now included the seven you have have already talked about.

The WITNESS: The ten—seven Navajo rugs and then there is ten blankets; you see they are different in size and they run a little different in price.

The COURT: What is the value of them?

The WITNESS: The ten, they go from $135.00 to $140.00 apiece.

24 Q. Now you mentioned seven Navajo rugs and ten blankets and two Mexican rugs?

A. The two Mexican rugs, well, they are heavy,

Q. Then you mentioned four woolen blankets?

A. Yes.

Q. And Mexican shawls?

A. And bolt of white silk.

The COURT: Now what else?

The WITNESSS That is all that was in the box that was stolen.

Mr. FOOTE: I object to that.

Latter part of answer stricken out.

Q. By the first box you mean the big box you described yesterday?

A. Yes.

Q. Were there any any common sheets in that box?

A. There were ten sheets in it.

Q. What were they used for?

A. They were used for wrapping so they wouldn't get dusty or nothing.

Q. Now Mr. Dettelbach, what if anything do you know in regard to the contents of the other two boxes, that is, the two smaller boxes in this shipment?

A. The only thing I know, the stuff was there at Langton Brothers, it was put there.

Q. And when the goods reached Cleveland you may state whether or not you saw these two boxes?

A. Yes, I seen the two boxes.

Q. And when was that?

A. That was in November; oh, I seen them down at the depot.

Q. And you were here, as you have said yesterday, in the month of September, 1911, you were here in Cleveland?

A. Yes, sir.

Q. And you may state whether or not you received this bill of

lading which is "Plaintiff's Exhibit 1," which has been identified—whether or not you received that in September 1911?
A. I received a bill of lading from Denver.

Mr. FOOTE: You mean this particular one?
Mr. YOUNG: Exactly.
Mr. FOOTE: "Exhibit 1," that is the one you got?
The COURT: Yes.
Mr. FOOTE: The one that this teamster had—that the one you got?
The WITNESS: Must be.

Q. After you received this bill of lading what, if anything, did you do in regard to trying to get your goods?
A. I give it to the bookkeeper and he traced it, the Burlington traced it to the Big Four.
Mr. FOOTE: What bookkeeper?
The WITNESS: Sperling.

Mr. FOOTE: Object to what somebody traced.
The COURT: Stricken out.

Q. After you got this bill of lading what, if anything, did you do in trying to—in the way of trying to locate your goods?
A. I give it to the expressman.
Q. What expressman?
A. A fellow by the name of A. Baker.
Q. Is he here this morning?
A. No.
Q. What company was he with?
A. I guess he is working for his father.
Q. Did he have a wagon?
A. Yes, sir.
Q. Did he have a stand?
A. Yes, sir.
Q. And did you hand him this bill of lading?
A. Yes, sir.
Q. And did you see him afterward?
A. Yes, sir.
Q. Speak to him on various occasions?
A. Yes, sir, every day.
Q. Did he locate your goods?
A. No, sir, he went to all the depots in town.

Mr. FOOTE: Never mind what he did.
The COURT: Yes.

Q. When he didn't locate your goods what did you do next?
A. Then we started to trace them.
Q. What was the result of that.
A. Why the Burlington Road, was shipped over the Big Four.

Mr. FOOTE: Never mind.
The COURT: I suppose he talked to somebody in authority down there. I would let him answer.

Q. When if at all, did you go to the warehouse of the Big Four Railroad?

A. As soon as I was notified the Big Four had it, through
26 the bookkeeper.

Q. And about when was it that you went to the warehouse of the Big Four?

A. It was in October.

Q. And who did you see there?

A. Mr. Andrews.

Q. What is his first name?

A. A. Andrews.

Q. And where did you find him?

A. Upstairs.

Q. And what was he doing?

A. I couldn't tell you; he was writing there something.

Q. And how did *to* come to go to him?

A. Why, I was sent by one of the men downstairs up to him.

Q. Did you have this bill of lading?

A. Yes, I had this bill of lading.

Q. And you were referred to Mr. Andrews upstairs and you went up there and you found him?

A. Yes.

Q. Did you present him the bill of lading?

A. Yes.

Q. What did he do about it?

A. He told me there was one of the boxes gone——

Mr. FOOTE: Object to what he said unless he had the authority to bind the company in such a case; the clerk in the office had no power in anything of that kind.

The COURT: Oh, I think he can answer that.

To which ruling of the court the defendant then and there duly excepted.

Q. Go ahead, he said one of the boxes was gone.

A. Yes, sir, and that a nigger had taken it; he had the nigger located and if I would wait—I told him I certainly would—that detectives were on the nigger's trail and they would soon have the box returned; so I left him my telephone number and he was to call me up the minute they found it, but I never was called up.

Mr. FOOTE: I renew my motion to have the answer stricken out.

Whereupon the court overruled the motion to which ruling of the court the defendant then and there duly excepted.

27 Q. Well, you may state what else, if anything, Mr. Andrews said about the goods at this time, this first interview?

A. Mr. Andrews seen the two boxes back of the——

Mr. FOOTE: Reserve my objection.

The COURT: Yes, all this conversation goes in under objection.

Q. If there is anything else that he said?

A. I have stated about what he stated.

Q. I will ask you whether or not he stated what time of the day the box had been taken?

A. He told me in the day time, as they were loading freight, he says was when the box was taken; they missed it around noon, I believe he said.

Mr. FOOTE: Same objection.

The COURT: This all goes in under objection.

Q. After that conversation, will you state whether or not he went down with you to the lower floor, whether he went down with you to the lower floor where the freight was?

A. Yes, he went down with me to the lower floor.

Q. Where did you and he go?

A. He went to the boxes that stood by the post.

Q. Where were they?

A. Standing by a post, right near a door.

Q. While you were there looking at those boxes did you have any further conversation?

A. Conversation about them being in bad order.

Q. What was said?

A. He stated the boxes looked bad, "Somebody has broken into them".

The COURT: Mr. Andrews said that?

The WITNESS: Mr. Andrews.

Q. What did you notice about the boxes yourself?

A. I seen the covers were partly gone and loose.

Q. And while you were there, was anything further said about the other box which was missing?

A. No, sir, he told me to wait, that he would get the box for me as soon as they got the nigger, that is all that was said.

Q. Was anything said as to the place where the three
28 boxes were located when one of them disappeared, whereabouts in the warehouse the goods were?

A. Well, they were about twenty feet from the desk, I should judge is where the goods stood when I seen them and there was boxes of shoes and stuff around there and he says, "It is very funny they should go over there and get this box of blankets when they could get shoes and clothes right here, right side of them."

Q. Tell what kind of a place this was where you found these two boxes?

A. Well, I seen the two boxes about twenty feet from the door.

Q. In what kind of a room?

A. In the freight house.

Q. That is the big freight house of the Big Four Railway?

A. Yes, sir.

Q. Well, Mr. Dettelbach, you saw these two boxes on that occasion, did you see them after that?

A. No, sir.

Q. Not there?

A. No, sir.

Q. State whether or not you saw them at your home?
A. Yes, sir, I seen them at home.
Q. And state whether or not you saw the contents of those two boxes?
A. Yes, sir, I seen the contents.
Q. What were in them?
A. There was two blankets, two Mexican blankets, and some women's wearing apparel.

The COURT: In the boxes that were delivered?
The WITNESS: Yes.
The COURT: Any question about that?
Mr. YOUNG: Some things we can show were missing that had been shipped; of course, we depend on the depositions taken out at Denver; something had been removed.
The COURT: Are those some of the things that were sued for?
Mr. YOUNG: Yes.
The COURT: All right.

Q. You can go ahead and state what was in these boxes, you say there were two blankets when they got to your house?
29 A. There were two blankets and some women's wearing apparel, was all I seen come out of them.
Q. Of your own knowledge, do you know whether or not there had been any other articles put in these boxes before they were shipped from Denver?
A. No, sir.
Q. About what was the weight of the articles which were left in these two boxes?
A. Oh, probably 35 or 40 pounds.
Q. In each box, you mean?
A. In the both of them.
Q. Have you got one of those Mexican blankets here this morning which was——
A. Yes, sir.
Q. Is that part of the same lot of goods which were shipped part or most of them, in the big box?
A. Well, it is kind of an imitation for them; they can see what it is.

Mr. FOOTE: It is unnecessary to encumber the case with a blanket.
The COURT: No, I don't suppose,—it isn't like having a lot of expert witnesses here to testify about a blanket.

Q. Mr. Dettelbach, I call your attention to this bill of lading marked "Plaintiff's Exhibit 1" and I will ask when, if at all, your attention was called to this red ink writing or printing on the bill of lading?
A. That red ink, I never seen it until it was shown to me.
Q. When was that ?
A. I don't recollect when that was.
Q. When was it with reference to the shipment of the goods?
A. That was sent to me but I don't remember seeing anything on that.

The COURT: When you first got it what do you recollect about red ink.

The WITNESS: I don't recollect anything about it not a thing.

The COURT: So you don't, therefore, remember when you first saw it?

The WITNESS: Yes.

The COURT: You do remember when you first saw the red ink?

The WITNESS: No, sir, I don't remember anything about
30 the red ink.

Q. Where were you when you first saw this bill of lading?

A. Out at the house.

Q. You mean here in Cleveland.

A. Yes, sir.

Q. What if any, knowledge did you have in regard to this shipment of goods—what was done in Denver, Colorado, at the time?

A. I wrote to them, told them to ship them.

To which answer the defendant objected which objection was sustained by the court.

Q. What if any, knowledge did you have as to what was done at Denver, Colorado, in regard to the shipment of these goods?

Mr. FOOTE: You mean his own, personal actual visible knowledge.

Mr. YOUNG: Yes.

A. Wrote my son and told him to go over there.

Mr. FOOTE: Object.

The COURT: Oh, yes, I don't know, but what your inquiry may be all right if he knows.

Q. What, if any, personal knowledge did you have as to what was done at Denver, Colorado, in regard to the shipment of these goods?

A. Well, personal knowledge, I know that the goods were shipped because I wrote to him to ship them.

Q. What, if anything, else do you know about what was done there at that end?

Mr. FOOTE: Not what somebody wrote you or told you, what you know yourself; you weren't there, were you?

The WITNESS: No, sir, I wasn't.

Mr. FOOTE: Don't know anything about it then.

Q. What was the freight on these goods, Mr. Dettelbach?

A. I think it was $14 95.

Q. There are some additional articles, Mr. Dettelbach, described on that schedule, you don't know about what was there when they were shipped but you saw those articles at your house and
31 will you state, if you know, what are the facts about an overcoat?

A. The overcoat was left there for to be shipped in these other boxes.

Q. Whose overcoat?

A. My overcoat.
Q. What kind of an overcoat was it?
A. Chinchilla.
Q. What was it worth?
A. $45.00.
Q. What do you know about a piano cover?
A. The piano cover was left there for to be shipped.
Q. And some bed spreads and comforts?
A. They were all there for to be boxed up.
Q. What were those things worth, those minor articles, if you know; don't spend much time on it, but state what you know about it and what they were worth?
A. Collarette-muff was worth $50.00, collarette, white one $25.00; pair of pillows, $10.00; overcoat, $45.00; piano cover $2.50; two beds spreads, $4.00; three comforts, $7.50.
Q. I will ask you, Mr. Dettelbach, if any of these articles you have mentioned were included in either of the boxes which you brought out to your house?
A. No, sir, these were included in the box that was brought out but there was nothing there whatever in it.

Mr. FOOTE: Object.
The COURT: Stricken out; he is asking you whether these articles were in the boxes that were brought out to your house?
The WITNESS: No, sir.

Q. Well, who was the owner of all this property you mentioned, Mr. Dettelbach?
A. I was the owner of most all, some of my son's stuff that was shipped in among them.
Q. That here?
A. Supposed to be, yes.
Q. Did he own any of these Mexican blankets and rugs?
A. No, sir.
Q. Just tell, now, what he did own; you can't recover for what he owned.
A. I owned all the blankets in that box that was lost, owned every piece that was in it, and paid for it.
32 Q. What was there that you have enumerated there that he owned, because that will have to be left out?
A. Well, he didn't own any of this here stuff that is marked down here; this other stuff he shipped after—his wife's things he was going to put into these boxes, but whether he put it in there or not I can't say.
Q. You haven't sued for anything that belonged to him then?
A. No.

Cross-examination.

By Mr. FOOTE:

Q. Your son is Mr. Barner?
A. Stepson—Barner.

Q. He was out there at Denver during the time this stuff was there in the Langton Brothers warehouse?
A. Yes sir.
Q. He opened those boxes out there at one time, I believe?
A. No, sir, not the box with the blankets he would never open.
Q. Well, he sold a lot of stuff out there and collected the proceeds and skipped out, didn't he?
A. No, sir.
Q. Got some of the stuff out of the warehouse and paid the charges on it and sold it and never accounted to you for it?
A. By me authorizing, he sold some of the furniture.
Q. You don't know what he sold?
A. The furniture is all he sold.
Q. You don't know what he sold, actually, you only know what he accounted to you for?
A. Mr. Langton had the——
Q. Never mind; I am asking you, you don't know what he sold personally?
A. No, sir, I wasn't there to tell you what he sold, personally.
Q. All you know is what he accounted to you for?
A. Yes, sir.
Q. This warehouse that this stuff—the boxes were in here, is the freight depot on the Big Four down here at the foot of Front Street?
A. Is what?
Q. This warehouse that you talk about is the freight depot of the Big Four Railroad on Front Street?
A. Yes, sir.

33 Redirect examination.

By Mr. YOUNG:

Q. Do you recall any other conversation with Mr. Andrews or any other statement that Mr. Andrews made in regard to these goods, with reference to the time when this box was lost or missing?

To which question the defendant objected, which objection was overruled by the court, to which ruling of the court the defendant then and there duly excepted.

A. No, sir.
Q. That is all?
A. That is all I remember.

Whereupon further to maintain the issues on his part, the plaintiff read in evidence the deposition of Edward Barner, as follows;

Deposition.

ALAMEDA, CAL., April 29th, 1913.

By WM. DUFOUR:

Q. State your name, age and occupation and place of residence.
A. Edward Barner, age 31, coremaker, 2221 Central Avenue, Alameda Cal.

Q. Where did you reside in the year 1911?

A. At Denver, Colo. 1105 Stout Street.

Q. State whether or not about the 11th day of September, 1911, you looked after the shipment of three boxes of goods from Denver, Colo. to Cleveland, Ohio.

A. Yes.

Q. Give a description of the size and shape of these boxes and the marks upon them?

A. Well there was one box between four and five feet square. The other boxes were somewhat smaller. I am not able to state just about the size of them at this time because my memory is rather cloudy. While I handled them myself I can not state the exact size, but they were smaller than one box. One box was between four and five feet square.

Q. What if anything, did you have to do with the packing of the large box?

A. I had nothing to do with the packing. I was there when the large box was packed but had nothing to do with it.

Q. Who packed this box, and when, and describe its contents so far as you can?

A. Mr. Dettelbach packed the large box and there were
34 some Indian rugs, silks and other things in it, I know there were Indian rugs and silks but what size I am unable to state.

Q. State whether or not this box was opened while it was in storage at Denver.

A. No, sir not to my knowledge.

Q. State, what, if anything, you did in regard to packing the two smaller boxes and give a list and description of the articles put in them?

A. There were three boxes and I unpacked the three when I shipped them and made two, I made two boxes out of three. In them boxes there were two Indian blankets, five woolen blankets, ladies' dressing apparel that belonged to Mrs. Dettelbach, a very expensive laprobe and some furs, one dozen silver knives one dozen silver spoons, some expensive hand painted china, two expensive ostrich feathers, and then a few other things I cannot just recall at this time. Oh, yes, and a couple pair of new shoes.

Q. Referring to the rugs and blankets in the large box, state if you know, how long Mr. Dettelbach had had them, and where he got them, and give any other facts you know in regard to these goods and their value?

A. I do not know anything about the large box, I cannot state the value of them as Mr. Dettelbach bought them himself, and I am not sure where he got them, but I believe it was down in the Navahoe Reservation.

By J. J. ALLEN:

Q. Are you a relative to Mr. or Mrs. Dettelbach?

A. I am to Mrs. Dettelbach.

Q. Son?

A. Yes, sir.

EDW. BARNER.

Subscribed and sworn to before me this 30th day of April, A. D. 1913.

WM. DUFOUR,
Notary Public in and for the County of Alameda, State of California.

Whereupon further maintain the issues on his part, the plaintiff read in evidence the deposition of WILLIAM A. LANGTON, as follows:

Mr. YOUNG, reading.

By Mr. ERL H. ELLIS:

Q. State your full name?
A. William Langton.
Q. What is your residence?
A. 1939 West 32nd Avenue, Denver.
35 Q. What is your business?
A. Moving and storage.
Q. How long have you been engaged in this business at your present place?
A. Nine years.
Q. Do you know the plaintiff in this matter, Edward Dettelbach?
A. Not any more than just storing his goods; that is all.
Q. When did you first meet Mr. Edward Dettelbach in a business way?
A. May 22-1909.
Q. What business did you have with him at that time?
A. Storing his goods is all; and moving.
Q. Will you explain just in what way he approached you on that occasion? That is, what negotiations did you have?
A. Simply ordered a wagon to have the goods sent to the warehouse; that was all there was to it.
Q. What orders did he give you, as far as you can remember in detail, as to the place you were to get the goods from and what you were to do with them?
A. Just get them and put them in the warehouse was all there was to it.
Q. To go where to get them, Mr. Langton?
A. Up to his house.
Q. Where did this conversation or business negotiation take place? Can you remember?
A. Why, I don't remember. He just simply came in there and ordered the wagon.
Q. In your store?
A. I think so, but I am not certain. I think his wife came down; they came and ordered the wagon. But I met him at the house.
Q. What did you do in the way of carrying out this order?
A. Loaded up and put it in the warehouse.
Q. Where did you get the stuff referred to?
A. Think it was on Bryant between 33rd and 34th. I don't happen to have the number with me.

Q. Did you in the course of your business make some memorandum of this order in some certain reception or order book that you use in that connection?

A. Yes, but I cannot find the book.

36 Q. Do you in your business have a book in which you make an entry or entries of goods stored with you?

A. Yes.

Q. At the time to which you have referred, did you yourself move these goods from the place on Bryant street mentioned to your warehouse?

A. I was one of them.

Q. Did you yourself make the entry of these goods in your warehouse and storage book?

A. I did.

Q. At the time that they were stored in your warehouse?

A. I did.

Q. Have you that book with you?

A. I have.

Q. Will you allow this book, or a page thereof, to be made a part of this deposition?

A. You can have a copy, but I won't give you the book. The book is my receipt for the goods.

Q. Will you allow the notary to use this book and make a complete copy, and certify to it that it is a correct copy of the entry concerning which you have testified above, and allow this copy to be made a part of your deposition?

A. Yes, that *it* all right. (Exhibit A.)

Q. Do you remember in particular receiving and storing the four boxes and contents, the second item of the above marked Exhibit A?

A. I do.

Q. Can you give any definite description of any or all of those four boxes?

A. No.

Q. Do you remember anything concerning them or their appearances?

A. Just simply that they were boxes; that is all I know.

Q. Are these four boxes now in your warehouse?

A. No.

Q. Were all of these boxes, or any one of them, removed from your warehouse by yourself?

A. Yes, they were.

Q. Were all four boxes removed by you at the same time?

A. No.

Q. What box or boxes and how many were first removed by you?

A. Well, the four boxes were made into three; that is,

37 what I mean by that is that there were some small boxes and he packed two of them over and made one box. He did not do anything with the other, just said to let it go just as it was.

Q. To whom do you refer in this last answer by "he"?

A. Mr. E. Barner.

Q. Had you met this Mr. Barner before these transactions?

A. Yes.

Q. What relation did he bear to the plaintiff in this action?

A. He is the son of Mrs. Dettelbach; that is, as I understand it Mrs. Dettelbach has been married twice; this is her son by a former husband. That is the way I understand it.

Q. Did Mr. Barner, then, give you instructions concerning these goods?

A. Yes.

Q. At what time did he first give you any instructions concerning these goods stored in your warehouse?

A. Well, the first time he made any mention to me about it, he said he was going to sell them all.

Q. Do you remember the date?

A. Not the exact date.

Q. About when, should you say?

A. Oh, I should judge along about the latter part of July, 1911, because it was in August they went out.

Q. At the time of this conversation with Mr. Barner, to which you have just referred, were the goods mentioned in Exhibit A in the same condition in your warehouse that they had been when placed there? That is, were all the goods there that had been placed there at the time you moved the goods?

A. Yes.

Q. When was the first occasion upon which any of these goods were disturbed?

A. May 27th, 1909.

Q. What was the occasion to which you have just referred?

A. On that date Mrs. Dettelbach got out two iron beds ends, two rails, one spring and a mattress.

Q. Upon this occasion, were the four boxes to which you have referred in any way disturbed or changed?

A. They did not have to be changed except tearing down the stock to get that stuff out: that is all.

Q. They were not opened in any way?

A. No.

38 Q. What was the next occasion upon which any of the goods referred to in Exhibit A were disturbed?

A. About the time he wanted to sell them off; I don't remember the dates on that because Mr. Barner was there two or there different times, and he wanted to sell them off, and I told him he could not sell them off without his mother would give an order to that effect because they were stored in her name.

Q. At the time of the storage of these goods, did you issue a warehouse receipt?

A. I did.

Q. How many copies do you customarily issue of such a receipt?

A. Just the warehouse receipt and the carbon copy, which I have here.

Q. The original and a carbon copy?

A. Yes.
Q. To whom was the original delivered?
A. Mrs. Dettelbach.
Q. And who retained the copy?
A. We did.
Q. The carbon copy to which you have just referred is the original from which the Exhibit A herein was made?
A. Yes.
Q. Have you the original in your possession?
A. I have.
Q. Will you allow this original warehouse receipt to be attached to and made a part of this deposition?
A. Not the original. I will allow a copy, as this is my receipt. I have nothing to show when that is gone.
Q. Will you allow this original warehouse receipt to be copied by the notary and marked "Exhibit B," certified to by him as an exact copy, and become part of your deposition?
A. Yes.
Q. Under what circumstances was this original warehouse receipt, a copy of which is Exhibit B, returned to you?
A. It was returned to me before I delivered the goods.
Q. By whom?
A. By Mr. Barner.
Q. Were any other papers delivered to you at that time by Mr. Barner to show his authority in the control of these goods?
A. The only thing I have is the card from her instructing me to let him have them.
Q. Will you allow this card to be made a part of your deposition?
A. A copy of it.
39 Q. Will you allow this card to be copied by the notary and marked "Exhibit C", certified to by him as an exact copy, and become part of your deposition?
A. Yes.
Q. After Mr. Barner delivered to you the original warehouse receipt, and after you had received the card referred to from Mrs. Dettelbach, did you give Mr. Barner free access to the goods stored?
A. Yes.
Q. Did he make arrangements for the disposal of the goods stored?
A. No, he tried to, and he found he could not; and he asked me if I would not get some one to bid on them. I got the Ward Auction Company and they submitted a bid and I told him what it was and he said all right, to take it.
Q. Do I understand then, Mr. Langton, that part of the furniture stored was moved on this occasion?
A. Yes.
Q. About what date?
A. Delivered to the Ward Auction Company on the 19th day of August.
Q. Were the four boxes to which we have specifically referred above delivered to the Ward Auction Company or sold at this time?
A. No.

Q. Did Mr. Barner assume control, and did you give him access to these four boxes?

A. I did.

Q. Did he at this time open these four boxes?

A. I don't think he opened one; but he made the remark that box was all right, but the others he had to take the stuff out of. He made three of them.

Q. He then unpacked three of the boxes?

A. He unpacked three; There were four; he made three instead of four.

Q. Were you there upon the occasion when Mr. Barner unpacked the three boxes and repacked them into two?

A. Well, I was in and out. I was not just there when he was doing it. The one big box he did not do anything with at all; that is when I was there but these little boxes he worked over and took goods out, piled the goods out on the floor, making three instead of four.

Q. The point was, how many boxes did he open, do you think?

A. Why, he opened three.

Q. You believe then that three of the boxes were unpacked and repacked in the two boxes?

A. I know it.

Q. The fourth box was unopened?

A. Not to my knowledge. I never saw him open a thing; never saw one open. He made the remark: "Let her go like she is."

Q. What orders did Mr. Barner give you in regard to these three boxes?

A. To take them to the depot and ship them to the best advantage, pay the freight, and bring him the bills and he would pay me.

Q. Was this verbal?

A. Yes.

Q. Did you carry out Mr. Barner's instructions?

A. I did, to the letter.

Q. Did you yourself remove the three boxes to the freight depot?

A. I did.

Q. Was one of the three boxes that you removed to the freight depot, one of the four original boxes stored with you?

A. It was.

Q. And the other two boxes were the ones repacked, to which you have referred?

A. They were.

Q. To what freight office did you finally remove these boxes?

A. Burlington & Missouri.

Q. Upon what date did you remove these three boxes to the freight depot from your warehouse?

A. 18th of September, 1911.

Q. Did you yourself give the shipping instructions to the freight agent?

A. I did.

Q. What papers were issued and delivered to you at this time?

A. Bill of lading.

Q. Was more than one copy of the bill of lading delivered to you?

A. Two.

Q. What did you subsequently do with these two bills of lading?

A. Gave them to Mr. Barner.

Q. You gave both of them to him?

A. Yes, sir.

Q. Have you ever received back from him or any one else either of these bills of lading?

A. I never have.

Q. Can you give any particular description of the size or shape of the three boxes removed by you to the railroad freight agent?

A. No, sir, I could not, only that one was bigger than
41 the other two. I paid no attention to them. If I had known this was coming up I could have taken some note, but I did not. It is an every day occurrence, you know.

Q. About what size were the small boxes, have you any idea?

A. No, I have not.

Q. Were there any marks of any kind upon any of these boxes, which you remember?

A. I don't remember any, only the address I put on there myself, the shipping address.

Q. What address was that?

A. Mrs. E. Dettelbach, Cleveland, Ohio.

Q. You wrote this address upon each of the three boxes?

A. Yes, sir.

Q. When the two boxes to which you have referred were repacked, did you notice what articles were placed in them?

A. I did not.

Q. You have no recollection of the contents of those two boxes?

A. I have not.

Q. To the best of your knowledge, Mr. Langton, the one box deposited with you among the four on or about May 22-1909, was shipped by you on or about September 18th-1911, without having been meanwhile opened or tampered with?

A. Never knew anything about it.

(Mr. FOOTE, reading):

Cross-examination.

By T. M. STUART, JR.:

Q. As I understand, Mr. Langton, Mrs. E. Dettelbach delivered to your warehouse for storage about May 22-1909, four boxes?

A. Included with this bunch of goods.

Q. Did you ever know what was in those boxes?

A. Didn't know anything about it.

Q. Did you ever receive instructions from either Mr. or Mrs. E. Dettelbach to turn those boxes over to Mrs. Dettelbach's son, Mr. Barner?

A. I did.

Q. Do you have that instruction with you?
A. That postal card.
Q. You mean the postal card, Exhibit C?
A. Yes.

42 Q. Some time in August, 1911 did Mr. Barner, the son of Mrs. Dettelbach, open part of the four boxes stored and repack them into different boxes?
A. Yes.
Q. Did he open all of the boxes except one?
A. I never saw him open the one. He took the loose stuff and made two boxes of them.
Q. He opened, then, all of said boxes except one?
A. Yes.
Q. Do you know what he repacked into the boxes?
A. I don't know.
Q. Do you know that he repacked the same goods that were in the original boxes?
A. He did, so far as I know. I didn't see anything around.
Q. But you cannot state of your own knowledge what he packed into the three boxes?
A. No, I could not. I didn't pay any attention to it.
Q. Now, did Mr. Barner instruct you to ship said boxes by freight to Mrs. Dettelbach?
A. He did.
Q. Did he give you that instruction in writing?
A. Verbal.
Q. State what he said in giving you those instructions?
A. He said to me to take those three boxes and ship them to his mother, and ship them to the best advantage, pay the freight, bring him the bill of lading, and he would pay me.
Q. Best of advantage to whom, Mr. Langton?
A. The cheapest way I could ship them.
Q. Did you follow out his instructions?
A. I did.
Q. I hand you defendant's Exhibit No. 1, which is the original bill of lading under which the shipment in question moved. I will ask you if the signature "Langton Bros." is in your handwriting?
A. It is.
Q. Did you sign it?
A. I did.
Q. On September 18, 1911, the date on which you signed the bill of lading, defendant's Exhibit No. 1 were you doing storage business under the name of Langton Bros.?
A. Yes, sir.

Q. And did you sign the name Langton Bros. upon the
43 bill of lading in all shipments of goods stored with you?
A. Yes, Sir.

The attorney for the defendant herewith hands to the Notary Exhibit No. 1 of the defendant, being the original bill of lading under which the three boxes in question were shipped by Langton

Bros. on September 18-1911, to Mrs. E. Dettelbach, Cleveland, Ohio, and to be attached to and become a part of the testimony of said W. A. Langton.

Mr. FOOTE: May it be understood now in the record that the Exhibit No. 1 referred to here as "Defendant's Exhibit 1" is the exhibit already offered in evidence by you, Mr. Young?

Mr. YOUNG: That bill of lading, yes.

Q. Did you have a conversation with the freight clerk at the time this bill of lading was executed?

A. Nothing more than he asked me if I wanted to release it.

Q. Just state that conversation.

Mr. YOUNG: I object to that.

The COURT: What is your objection?

Mr. YOUNG: In the first place, they rely upon a written stipulation, that would seem to exclude anything else.

Mr. FOOTE: This has to do with placing of the option upon the shipper.

The COURT: That is in writing; I think I will sustain the objection on the ground that what you rely upon is in writing, I haven't seen the bill of lading; that is, the representation as to value is in the bill of lading.

Mr. FOOTE: This is simply the conversation that took place at the time the bill of lading was issued, as to when it was that the released value was placed upon it, has nothing to do with the terms
44 of the contract, only has to do with the making of the contract, when it was made.

The COURT: I am doubtful about it being admissable. I sustain the objection.

To which ruling of the Court the defendant then and there duly excepted and expects the answer of the witness to be, if permitted to read it: "Well, just simply handed to him the bill of lading, and he said: "Do you want to release this, or don't you?" and I told him: "Yes, he wants it released."

Q. After you told him that you wanted——

Mr. YOUNG: Object to that question being read.

Which objection was sustained by the Court, to which ruling of the Court the defendant then and there duly excepted and expects the remainder of the question and the answer of the witness thereto to be, if permitted to read it:—"it to move at the released rate," state whether that was before or after you signed the bill of lading.

A. It was right at the time, I suppose. I don't know whether it was before or after.

Mr. YOUNG: Object to your reading those further questions and answers in that connection same matter exactly.

Q. Do you remember when the writing appearing by the red stamp was put upon the bill of lading?

The COURT: You can answer that.

A. It was put right at the time.
Q. Did you sign under that red stamp?
A. Yes.

(The records will show that there is attached to the back of 'Defendant's Exhibit No. 1," a postal card, this card being attached by mucilage it is impossible to remove the same without destroying the signatures upon the exhibit, therefore it is allowed to remain but is not a part of the said Exhibit.)

Q. Do you have, Mr. Langton, any written communications from either Mr. or Mrs. Dettelbach about the three boxes you
45 shipped under bill of lading, Exhibit No. 1, to Mrs. Dettelbach?

A. I think I have something where they said there is one box lost.

Q. Did you state to Mr. Barner that you had shipped the said three boxes to Mrs. Dettelbach under released valuation bill of lading?

A. I did.

Q. What did he say?

A. I don't know as he said anything, only he hollered about the freight being so much. I told him I had to release them to get that rate.

Q. Did you tell him that the boxes were shipped at the released valuation rate?

A. I did.

Q. Do you know what the rate would have been had they gone at the value other than the released value?

A. One and a half times first class.

Q. Was it because Mr. Barner authorized you to ship these three boxes to Mrs. Dettelbach as cheap as possible that you shipped it under the released valuation rate?

A. Yes, sir.

Q. And was it because of said instructions that you signed said bill of lading, Exhibit No. 1, certifying that the property shipped under said bill of lading does not exceed in value ten dollars ($10.00) per hundred?

A. Yes, sir.

(Signed) WILLIAM A. LANGTON.

Whereupon further to maintain the issues on his part, the plaintiff, EDWARD DETTELBACH, re-offered himself as a witness and having been previously sworn, testified as follows:

Cross-examination.

By Mr. FOOTE:

Q. These goods were stored in Denver under Mrs. Dettelbach's name?

A. I think they were stored under my name: I took them there myself, I went with him, with the wagon, helped him unload.

Q. Why was it that Mr. Langton insisted on getting some word from Mrs. Dettelbach?

A. Well, I never wrote the Langton firm myself, to tell you the truth.

Q. They belonged to you, although they were stored under
46 Mrs. Dettelbach's name?

A. They were stored under my name at Langton Brothers, I took them down there.

Q. Then you and Mr. Langton don't agree about that?

A. Well, probably he has got it wrong; I bought them myself, I went with the wagon right to the storehouse and — there as they were taken from the wagon.

Q. However they were shipped, they were your goods and shipped under your directions.

A. Yes, sir.

Mr. YOUNG: I didn't quite finish the reading of some of the exhibits to this deposition of Langton's. "Plaintiff's Exhibit A" identified by him is as follows:

PEAINTIFF'S EXHIBIT A."

Rate $2.00 Per Month.

Warehouse Receipt.

Lot No. 247.
Room —.
Section 1.
Folio 18.

Langton Brothers' Warehouse.

1941 W. 32nd Avenue.

Telephone 2645 Main.

All Storage Payable Quarterly.

DENVER, COLO., May 22-09.

Have received on storage of Mr. E. Dettelbach goods enumerated in schedule annexed, to be delivered only upon order, surrender of this Receipt and payment of all charges.

The responsibility of the warehouse for the contents of any piece or package is limited to the sum of Fifty Dollars, unless the value thereof is made known at the time of storing and receipted for in the schedule. An additional charge will be made for higher valuation.

The responsibility of the warehouse for storage and handling is limited to ordinary diligence.

One month's storage will be charged for any portion of the first month; and after the first month a half month's storage will be charged for any fraction of a half month.

No transfer of goods will be recognized unless entered on
47 the books of the warehouse.

A reasonable allowance should be made by owner for ordinary wear and tear in handling, and all claims must be made in writing within five days after delivery of goods.

Present this warehouse receipt and written order when any goods are to be withdrawn. Goods will be delivered only upon receipt of a written order signed by the person in whose name they are stored.

One day's notice is required for access to, or delivery of goods. A labor charge will be made for unpacking and repacking.

Schedule.

If not correct, please report immediately.

5 R. Chairs
4 boxes and Conts.
3 Dressers
1 Curtain Pole.
3 R. Chairs
1 C. Table
6 D. Chairs
1 Garden Rake
1 Shovel
2 Trunks & Conts.
1 Book Case
3 R. Oil Cloth
1 Piano Stool
1 Lamp
3 bde. Carpets
2 Pictures (1 glass broken)
1 Picture Frame
1 W. Tub & Conts.
1 K. Cabinet
1 Carpet Sweeper
1 Child's Stove
1 " Dresser
3 Table Legs
3 Mattris-
1 Coal Hod & Conts.
1 Basket & Conts.
1 Bath Room Cabinet
1 W. Boiler & Cont.
1 D. Table Top
1 Side Board
1 Ct. Table Leaves
1 Curtain
1 Bdl. Curtain
4 I. Bed Rails
2 " Springs
4 " Ends

Not negotiable.

Mar. 29-1911.—Address 9005 Superior, Cleveland, Ohio, Sent. 3.
Aug. 29-1911.—Sold to Ward Auction Co. by order of E. Barner with instruction from Mrs. Dettelbach.
48 Address Mrs. Phelps on Wyandott St.
Son's address, 4339 Ames.
Call 1083 before making a delivery.

Mr. YOUNG: I wish to offer, if the Court please, in connection with this bill of lading, the freight bill which has been identified and is marked "Plaintiff's Exhibit 2."

Which said freight bill marked "Plaintiff's Exhibit 2" is hereto attached and made a part of this Bill of Exception.

Mr. YOUNG: I wish to offer also as "Plaintiff's Exhibit 3" a letter under date of December 21, 1911.

Mr. FOOTE: For the purpose of showing you filed your claim, I suppose?

Mr. YOUNG: Yes.

Mr. FOOTE: No other purposes.

Stipulation.

It is stipulated and agreed to be counsel for both sides that within four months after the shipment in question the plaintiff gave written notice to the defendant of his claim for damages in the amount stated in the petition.

Mr. FOOTE: $2,792.00.

Mr. YOUNG: And that payment of this was refused by the railroad Company.

Which letter marked "Plaintiff's Exhibit 3" is hereto attached and made part of this Bill of Exceptions.

Further direct examination of EDWARD DETTELBACH.

By Mr. YOUNG:

Q. In September, 1911, where were you living in the City of Cleveland?

A. 1288 East 90th.

Q. And you may state whether or not your name was in the city directory in the year 1911?

A. Yes, sir.

Q. You may state whether or not you received mail at your residence from time to time in the year 1911?

A. Yes, sir.

Q. And you may state whether or not down to the time
49 that you went to see Mr. —— that you went to the Big Four freight house, the time you have stated, you had received any written notice or any notification of any kind from the railroad company, in regard to this shipment?

A. Never received only one, that was after I went down there.

Q. That was after you went down there?

A. Yes, sir.

The COURT: The date you claim you went down there was what?

The WITNESS: It was during October, I can't tell the date.

Mr. YOUNG: The goods were obtained November 6th.

The COURT: Do I understand you got a communication from them some time in October, that the goods were there or something to that effect?

Q. What is the fact?

A. Yes, sir, during October I seen Mr. Andrews.

The COURT: That is the time you saw Mr. Andrews?

The WITNESS: And the two boxes were there.

Q. Before you had gone to see Mr. Andrews, had you received any notice of any sort from the railroad company?

A. No, sir.

Q. And you may state further any effort you had made to locate your goods after you received the bill of lading from Denver?

A. Why, we sent a tracer all over the Burlington.

Q. Yes, you said that; you spoke about Mr. A. Baker?

A. Mr. A. Baker started in the latter part of September and went around to all the depots to find out, with the bill of lading in his pocket, to find out if any boxes were there for me and he could find none in none of them.

Which said Bill of Lading marked "Plaintiff's Exhibit 1," is hereto attached and made a part of this Bill of Exceptions.

Whereupon the plaintiff rested.

Defense.

Mr. FOOTE: I want first to offer if your Honor please, the following stipulation. (Hands same to Mr. Young.)

50 I read in evidence this stipulation.

Stipulation.

Is is hereby stipulated by counsel for parties hereto that for the purpose of this case Langton Brothers were the duly authorized agents of plaintiff in the shipment of the property described in the petition, from Denver, Colorado, to Cleveland, Ohio, and that said Langton Brothers acting for plaintiff signed the clause embodied in said bill of lading reading as follows, to wit:

"I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per cwt."

And that said Bill of Lading and said clause therein inserted and said signature thereto may be offered as evidence in this case without the necessity of any further proof thereof.

Mr. YOUNG: What is the date of that?

Mr. FOOTE: It isn't dated.

Mr. YOUNG: Well, I suppose it will be conceded it was before this deposition was taken out in Denver?

The COURT: The deposition will show.

Mr. YOUNG: Well, in connection with that stipulation I wish to further stipulate that that was signed before the deposition was taken in which the original bill of lading was located out at Denver and attached to the deposition and cross-examination by the railroad company.

The COURT: He is making another stipulation.

Mr. FOOTE: No.

The COURT: I suppose the deposition shows exactly when it was taken and this stipulation is dated.

Mr. FOOTE: It isn't dated.

The COURT: Oh, I supposed it was.

Mr. FOOTE: I am perfectly willing to concede this stipulation was entered into prior to the taking of the deposition at Denver.

Whereupon to maintain the issues on its part, the defendant called as a witness, ERNEST L. DE HECK, who being first duly sworn, testified as follows:

51 Direct examination.

By Mr. FOOTE:

Q. Mr. De Heck, your initials are what?
A. Ernest L. De Heck.
Q. You are chief clerk at the freight agent's Office of The Cleveland, Cincinnati, Chicago & St. Louis Railway in Cleveland?
A. Yes, sir.
Q. Have been such for a good many years?
A. About twelve years.
Q. Who was the agent of the railroad in September, October and November, 1911?
A. A. J. Ehrler.
Q. He is now deceased, the present agent of the company was not here at that time?
A. The present agent was not here, no, sir.
Q. You are the next in authority to the agent?
A. Yes, sir.
Q. Are you familiar with the duties and powers of the various clerks in the office, freight office at Cleveland?
A. Yes, sir.
Q. Do you know Mr. A. Andrews?
A. Yes, sir, I do.
Q. What was he in the office?
A. He is what we call the over, short and damage clerk; that is he has charge of the reporting of over, short and damaged freight.
Q. That is, he makes reports to his superior officers?
A. Yes, now claim department.
Q. Under the name of Mr. Ehrler, at that time as agent.
A. Yes, per him.
Q. Mr. Andrews reports to the agent, as I understand you?
A. Yes, he is directly under the agent.
Q. And his duties are such as the agent prescribes for him?
A. Yes.
Q. What were his duties at the time?
A. Well, as I stated before, his duties were entirely in handling over, short and damaged freight, that is, making the reports,
52 examining freight when necessary and making proper notations on bills, etc.
Q. Under the direction of the agent?
A. Yes.
Q. He reports that to the agent, does he?
A. He wouldn't make his report to the agent, he would make his report to the freight claim department, that is acting as agent for the agent.
Q. Acting as a clerk in the office, you mean?
A. Well, the same thing; we specify him an agent for the agent in this case in handling the matter.

The COURT: General freight agent you mean?
The WITNESS: No, the local freight agent; you see, he would come directly under the local freight agent.

Cross-examination.

By Mr. YOUNG:

Q. What you mean to say is, Mr. Ehrler was the local freight agent in the year 1911?
A. Yes.
Q. And that you and Mr. Andrews and a good many other men were under Mr. Ehrler?
A. Yes, sir.
Q. And that you each had your separate part of the work to do. And that Mr. Andrews had particular responsibility in regard to keeping track of shortages and troubles of that sort?
A. Yes, sir, that is right.
Q. And if freight was not located or if part of a shipment arrived and the rest didn't come, anything of that sort, was for Mr. Andrews to investigate and look after?
A. As far as the freight house itself was concerned, he wouldn't go into it any further, as far as making settlements or anything of that kind.
Q. But so far as occurrences there is the warehouse along that line, he was the man that was chiefly responsible?

Objected to.

Q. Or chiefly concerned about it?

Objected to.

53 Q. He was the man that looked after that thing?
A. He was the man that would make the report only.
Q. But he is the man that investigates it?
A. He investigates through the house and ses whether he can locate the shipment, for instance, and if not, makes the proper report on it.
Q. Now, do you remember the trouble that occurred in regard to three boxes of goods that were received by the Big Four at your warehouse in 1911, September, or thereabouts, from Denver, consigned to Mrs. E. Dettelbach?
A. The only thing I know about it is, there was a box reported short in the house; now, as far as the matter itself is concerned, I don't know anything about it. They reported a box short and I know they tried to find it. I couldn't say only that I know that the shipment was reported short.
Q. Tried to find it and you didn't find it?

Mr. FOOTE: Object, second hand information.

The COURT: Did you do anything about it?
The WITNESS: I would get it second hand; I didn't do anything at all, they would tell me that part of a shipment was short, naturally.

Q. Whose business was it, Mr. De Heck, if you know, to notify customers when freight was received in the warehouse, I mean to notify the consignees when freight was received in the warehouse?

A. That would be the duty of the clerk in the cashier's office.

Q. I will ask you to look at a postal card here, appearing to be a postal card of the railroad, and state if you can identify that postal card?

A. Looks like one of our cards, it is one of our cards.

Q. That is addressed to Mrs. E. Dettelbach, isn't it?

A. It is a question now, it is all pasted up; it reads "Dettelbach" on it very plainly and "Mrs."; but the rest of it I can't see, "Mrs. Dettelbach".

Q. Did the party directing that envelope put any street address on that postal card?

Objected to.

The COURT: The postal card shows itself, I suppose.

54 A. The postal card doesn't show any address outside of the postoffice address; that is a third notice; there were two notices sent previous to that.

Mr. YOUNG: This postal card may be marked for identification, "Plaintiff's Exhibit 4."

Q. Mr. De Heck, if the names of the consignees were in the city directory, why didn't your office, sending out this notice, give the street address of Mr. Dettelbach?

Objected to by defendant.

A. It is not customary to look up the names in the directory.

Mr. FOOTE: Wait a minute, I object to the question.

The COURT: Overruled.

To which ruling of the court the defendant then and there duly excepted.

Q. Did you have any conversation with Mr. Andrews about this particular transaction at the time?

A. No, I don't know that I did; if any, I think it was the cashier's office that reported to me that there was a box short or else the delivery man—somebody in the warehouse, going through the warehouse said one short.

Mr. FOOTE: Ask to have all the answer stricken out except that simply states he did not.

The COURT: Overruled.

To which ruling of the court the defendant then and there duly excepted.

Q. Are you in a position to state when that shipment reached your warehouse?

A. No, sir, I am not.

Q. How would you find out?

A. I couldn't say, I haven't the records.

Q. Suppose you look at a way bill here and see if you can tell anything about it from that?

(Handing "Plaintiff's Exhibit 2".)

Mr. FOOTE: Object, unless he knows of his knowledge.

The COURT: He may examine the bill.

55 A. The bill shows it was received September 27th.

Q. What year.

A. 1911.

Q. And when was the shipment or whatever part of it was delivered, when was it delivered?

Mr. FOOTE: Object, I brought this witness in here for one specific purpose, to show what the authority was of Mr. Andrews; now, if he wants to go into this, let him put him on as his own witness, that is part of his own case. I brought him here only to rebut the testimony as to the authority of Mr. Andrews to speak for this company, not for any other purpose. I object to cross-examination of him for any other purpose except on this ground, as to receipt of, delivery of the goods.

The COURT: I don't see any particular objection to it; he is on the stand as your witness, I don't know what purpose you had in putting him on, I don't know as that prevents the other side from asking him questions that are relevant to this law suit.

Whereupon the court overruled the objection, to which ruling of the court the defendant then and there duly excepted.

Q. You may answer if you can, Mr. De Heck, you can look at that way bill?

To which question the defendant objected.

By Mr. FOOTE:

Q. Have you any personal knowledge about the receipt of this shipment by the Big Four Railroad Company?

A. I have not.

Mr. YOUNG: I withdraw that question, already been testified this freight was obtained November 6th and nobody denies it.

Redirect examination.

By Mr. FOOTE:

Q. Mr. De Heck, these notices se-t out—they are not made out by the clerks from actual inspection of the property, are they?

A. No, sir.

Q. They are made out from the way bills?

Objected to by plaintiff.

A. From the freight bills.

Mr. YOUNG: Object to cross-examination of his witness.

56 The COURT: Yes, of course, the question is leading, you can ask him how they are made out.

Q. How are the notices made out?
A. The notice is written up from the freight bill.
Q. How is the freight bill made out?
A. The freight bill is written from the way bill.
Q. Is this the freight bill, this exhibit just handed you?
A. Yes.
Q. State whether or not that has any reference to the actual receipt of the specific property mentioned in the freight bill?
A. Only in the way of a check against the tally that was made of the freight coming out of the car.

Whereupon, further to maintain the issues on its part, the defendant read in evidence the deposition of A. W. TANGMAN, as follows:

(Mr. Foote, reading.)

By T. M. STUART, JR.:

Q. State your name and your occupation?
A. A. W. Tangman, Receiving Clerk, C. B. & Q. Freight Department.
Q. In what city?
A. Denver, Colorado.
Q. How long have you been employed in that position?
A. About three years.
Q. Were you employed as the Receiving Clerk in the Freight Department of the C. B. & Q. Railroad Company at Denver, Colorado, on the 18th day of September, 1911?
A. Yes, sir.
Q. Do you recall that on that date W. A. Langton of the firm of Langton Bros. engaged in the warehouse business in Denver, delivered to you three boxes of household goods to be shipped to Mrs. E. Dettelbach at Cleveland, Ohio?
A. Yes, sir.
Q. Did you personally receive said goods from Mr. Langton?
A. Yes, sir.
Q. Did you have any conversation with Mr. Langton about the shipment of the same?
A. Yes, sir.
Q. State that conversation?
A. I asked the gentleman if he wished to have it released or unreleased on account of the cheaper rate, and he said yes, he would have the released rate; so I applied our stamp and he signed
57 same.
Q. I hand you defendant's Exhibit No. 1, and ask you if it is the original bill of lading covering said shipment?
A. Yes, sir.
Q. I will ask you to read the clause therein made by the stamp relative to the released value.

(Witness reads from Defendant's Exhibit No. 1:)

A. "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per Cwt.

Q. Did Mr. Langton sign that bill of lading after you had applied the stamp containing the said clause?

A. Yes, sir.

Q. I hand you Official Classification No. 37, I. C. C. O. C. No. 37, and I ask you to examine the same. Was that tariff on file with the Interstate Commerce Commission on September 18th, 1911?

A. Yes, sir.

Q. Was it posted in the Freight Department of the C. B. & Q. Railroad Company at Denver, Colorado, on said date?

A. Yes, sir.

It Is Hereby Agreed by and between counsel for plaintiff and defendant, that the witness may read into his testimony certain portions of said tariff, and that as read they are identical with and the same as said portions appear in said original tariff handed the witness, subject to any objections appearing in the stipulation entered into at the commencement of the taking of these depositions.

Q. Now I will ask you to read the portions of said tariff appearing on page 109 relative to the shipment in question?

A. (Witness reads):

"Household Goods, Emigrants' Movables and Second-hand Furniture, P. P. (see Notes)—

"When the consignor does not declare the value or represents it to be more than ten (10) dollars per one hundred (100) pounds (subject to Note 2) (C. L. min. weight 12,000 lbs.) (subject to Rule 27) less carload lots 1½ times first class.

"When the consignor represents the value to be not more than ten (10) dollars per one hundred (100) pounds (subject to
58 Notes 1 and 2) (C. L. min. weight 12,000 lbs.) (subject to Rule 27) less carload lots first class."

Q. Were the portions of said tariff from which you have just read, in force and did they govern the shipment of three boxes of household goods made by Langton Bros. from Denver, Colorado, to Mrs. E. Dettelbach, Cleveland, Ohio, on September 18th-1911?

A. Yes, sir.

Q. Do you know the rate at which said three boxes moved under the bill of lading, Exhibit No. 1, containing the released value clause?

A. Yes.

Q. What was it?

A. $2.37½ per Cwt.

Q. Do you know what would have been the rate at which this property would have moved had the bill of lading Exhibit No. 1 not contained the released value clause?

A. Yes.

Q. What rate?

A. $3.563 per cwt.

Mr. Foote: Do I understand you offered the bill of lading in evidence?

Mr. YOUNG: Oh, yes.
(Mr. Young reading):

Cross-examination.

By ERL H. ELLIS:

Q. You have testified that you remember the occasion of Mr. Langton's call when *you* delivered to you the three boxes of household goods concerning which you have above testified. Do you remember in particular the goods covered by this bill of lading?

A. Yes, sir.

Q. Will you describe those as fully as possible?

A. Well, there were three boxes. I don't know as I could give the dimensions exactly. I know there was one large box and two small ones, but I don't know as I can give the dimensions exactly.

Q. Do you remember the approximate size of the larger box?

A. Oh, I should judge it was about 5'x4½'; something like that.

Q. Do you remember the approximate size of the smaller boxes?

A. They were smaller, but I don't know as I can give the exact size of them.

Q. What was the general character of these boxes? Were they ordinary packing boxes?

A. Yes, sir.

59 Q. Do you remember any marks that appeared upon any of these boxes?

A. No, sir, only the destination; where it was going; that was all.

Q. Do you remember no other details that would in any way assist in the description of these particular boxes?

A. No, sir.

Q. In your position as a Receiving Clerk, what duties do you have in relation to the tariffs concerning which you have testified?

A. Only to get the released value.

Q. Can you explain that further?

A. Why, for instance, you bring a shipment down there, it would be customary for me to ask you whether you wanted it released or not. If you want it released, I would apply the said stamp and you would sign the same. If not, I would leave it out entirely and mark the bill not to be released.

Q. It is not part of your duties to apply or determine under what tariff schedules or rates any certain movement will move beyond the determination of whether it shall move at a released or unreleased value?

A. No, only just what I have said.

A. W. TANGMAN.

Whereupon further to maintain the issues on its part, the defendant called as a witness, ALFRED A. ANDREWS, who being first duly sworn, testified as follows:

Direct examination.

By Mr. FOOTE:

Q. Your name is what?
A. Alfred A. Andrews.
Q. You are employed by this defendant railway Company?
A. Yes, sir.
Q. In what capacity, what is your position?
A. Clerk: I take care of the over, short and bad orders on the Big Four, Cleveland end.
Q. Under whose jurisdiction are you or were you in September, 1911?
A. Under Mr. A. J. Ehrler, agent.
Q. Do you remember three boxes of household goods consigned to Mrs. E. Dettelbach that were in the freight depot here in September, 1911, or thereabouts?
A. Yes, sir.
Q. I wish you would tell us in your own way what you know about those three boxes?
A. Those boxes were in the depot for three or four weeks, no party didn't make any call for them and I asked the cashier's
60 office several times if the party made any inquiry.

Objected to by plaintiff; sustained.

Q. Just what you yourself know?
A. Well, I examined these boxes there, passed every day perhaps 25 to 30 times a day, had to pass these boxes as I go from the office downstairs to the cashier's office or the foreman's office; they was right by what they call the run way where we go to the cashier's office. There was just a little scantling separated the boxes from the passageway.
Q. I wish you would describe those three boxes?
A. There were three, two large boxes and a small box; they was all piled on top of the others, two large boxes on the bottom, one on top and the smaller one on top of those.
Q. Can you give the size of the three?
A. Two of them was about that size there (indicating stenographer's table in court room).
Q. About the size of the stenographer's desk?
A. Yes.
Q. About three feet high and a little less than that wide?
A. That is it, just about that size and the small one was about half that size.
Q. Now, what happened to those three boxes that you know of?
A. One morning a man came up and asked me to come downstairs and look in the pile there; he says: "You see anything the matter there?" I says, "Yes, one of those boxes missing, what about

it?" He says, "Well, that has just disappeared within ten minutes," so I just went upstairs and reported to our agent, Mr. Ehrler, and also called up our Captain of Police to come right down and investigate the matter.

Q. What box was missing?

A. Small box, taken right off the top.

Q. The small one of these three boxes?

A. Yes, smallest one of the three. I passed them perhaps 25 to 30 times a day.

Q. They were marked in such a way that you knew they belonged to Mrs. Dettelbach?

A. Yes, sir. Our Captain of Police came down and I asked him to look at them and examine the marks so he would know if he recovered the other box, just what to look for and identify by the marks on the other two that was left.

Q. Did Mr. Dettelbach come down there?

A. Mr. Dettelbach, he came down either that evening from four to five or else the next day, I am not just sure.

61 Q. Did you have some conversation with him?

A. Yes, sir.

Q. What took place between you?

A. He asked me if he had some goods there and I told him, yes, he had three boxes but one of them was missing.

Q. What else was said?

A. He asked if we had—if we thought we could recover it; I said yes, I think we would; I said we had our police department on the matter.

Q. And were the other two taken away by him at that time?

A. No, sir.

Q. When were they taken away?

A. I couldn't say without the records, they was left there, I should think, for over a week.

Q. What condition were they in?

A. In good condition; I examined that morning and also the Captain of Police examined them all over.

Q. Had they been broken in any way?

A. No, sir.

Q. Prior to delivery to Mr. Dettelbach?

A. No, sir.

Q. Covers torn off in any manner prior to delivery?

A. No, sir.

Q. Nailed down tight, were they?

Objected to by plaintiff.

A. Yes, nailed tight.

Q. State just the condition of the tops and sides of the boxes, whether securely fastened or otherwise?

A. They were in perfect order because the Captain of Police and myself examined them very carefully after that other box was stolen.

Q. Did Mr. Dettelbach come down after that time at all?

A. Well, I didn't see him after that, just when he came that evening, either that same evening or the next evening, four to five; I couldn't say whether the same day the box was stolen or the next day.

Q. When was it you next saw him?

A. Oh, he came down, must have been considerable time afterward, made inquiry about the box.

Q. Did you see him recently?

A. Yes, sir, he was down there night before last.

62 Q. What took place at that time?

A. He asked me if the other box ever showed up; I told him no, we had never recovered it.

Q. Anything else said?

A. No, sir.

Q. Anything said about the size and character of the box?

A. Well he went on to say what was missing there; I says, "No, they couldn't get that stuff in the box because it was the smallest box was missing."

Q. Can you tell us now in feet the size of this little box that was missing?

A. I couldn't say without a rule. I could tell by the rule, it was about half the size of that desk there (indicating stenographer's desk).

Q. If this desk is three feet across the top, then the box would be one and one-half feet?

A. Yes, that is right.

Q. About one and one half feet wide?

A. The same square.

Q. About a foot and a half square?

A. Yes, sir.

Cross-examination.

By Mr. YOUNG:

Q. What is the name of that policeman that looked over the goods?

A. Billington, Captain Billington.

Q. Is he here this morning?

A. No, sir.

Mr. FOOTE: Would be glad to get him—didn't have time.

Q. I suppose, Mr. Andrews, you have seen a good many boxes of various descriptions in your warehouse since the year 1911?

A. Yes.

Q. And your attention has been called to a good many cases of trouble in reference to shipments and you have been engaged in that sort of thing right along?

A. That is right.

Q. Did you ever make any written report in regard to this particular shipment to Dettelbach?

A. Yes, sir.

Q. Got a copy of that report with you?
A. No, I have not.

Mr. FOOTE: I have it, Mr. Young.

Q. Who did you make that report to?
A. Mr. F. B. Boyser, Cincinnati, our freight claim agent.
Q. When did you make that report?
A. Well, I couldn't say now without the copy of my original report because our Captain of Police investigated the matter
63 to see whether he could recover the box before we made the report to him.

Mr. FOOTE: There is the report (handing same to Mr. Young).

By Mr. FOOTE:

Q. While he is looking at that—how much would that little box weigh, do you know?
A. That box must weigh about 60 pounds because I handled it once or twice to look at the mark to see whether any address was shown on it.

By Mr. YOUNG:

Q. Your report about this loss doesn't give any description of the boxes, their size or weight or anything of that sort.

Mr. FOOTE: Let him look at it and see.
(Witness examines paper.)

Q. Answer that question then, Mr. Andrews, whether the report which you made gives any description of the boxes or their size or weight?
A. No, not to our freight claim department: I reported that to our Captain of Police.
Q. Have you any memorandum in your possession or accessible, from which you can determine the kind of report you made, if you made any, with reference to the description of the boxes and their size or weight?
A. No, I reported that direct to him verbal.
Q. You do remember that there were three boxes?
A. Yes.
Q. And they were all marked addressed—consigned to E. Dettelbach?
A. That is it.
Q. Or Mrs. E. Dettelbach?
A. Yes, Mrs. E. Dettelbach.
Q. And I presume you may have seen the bill of lading which accompanied these in connection with these goods; I will ask you if you have seen this document which is marked "Plaintiff's Exhibit 1," being the bill of lading?
A. No, I haven't seen that before; I handled the original way bill on that, not the bill of lading.
Q. Have you got the original way bill?
A. I don't know whether it is here, no.
Q. Here is a freight bill which came from your office?

A. Yes, that is the original expense bill made from the way bill.

Q. Now, you can ascertain then the weight of the whole shipment, can you?

A. Yes, 590 pounds, weight of the whole shipment.

64 Q. And what do you say was the respective weight of the three Boxes?

A. What should I judge they weighed?

Q. Yes, you say three boxes there; now, what did each of them weigh?

A. Well, the big boxes, the two large boxes, I should say weighed about 200 pounds apiece and the small box I should judge by the handling, weighed about 60 pounds.

Q. That would be 460 pounds?

A. I say I am only guessing because I didn't handle the big boxes alone but the small box I did; I couldn't handle the large boxes alone.

Q. And when was the first time that you saw those boxes?

A. September 27th.

Q. How do you know you saw them then?

A. That is the report here, unloaded on September 27th; they were put in what we call the perishable pile. We don't very often put any other freight there except butter and eggs and by some mistake these boxes were piled right in the perishable pile and left there and never removed.

Q. Whose mistake was that?

A. Well, it wasn't exactly a mistake; it may have been the other part of the depot may have been full and they just put them there for the time being.

Q. That is, you mean to say they were put in an unusual place?

A. Yes.

Q. Where would goods of that class be usually placed?

A. What they call the furniture pile.

Q. And the goods were there for considerable time, you say?

A. Yes.

Q. Every day your warehouse was open?

A. Yes.

Q. And people coming and going?

A. Yes.

Q. Teamsters representing various consignees had access to that depot, go through and look at goods?

A. They are not supposed to look at goods.

Q. Well, they do it right along?

A. Oh, yes.

Q. Who was on guard to watch the goods which were in the warehouse?

A. Well, there is men there all the time, different men around the piles.

Q. That under your direction?

A. Well, yes, if anything occurs to the shipment, anything

65 lost or missing and found broken open, they report to me.

Q. Well, so far as your information is, this box that was taken, was taken in the daytime?

A. Yes, sir, about eight o'clock in the morning.

Q. There wasn't any breaking into your warehouse by robbers or anything of that sort that you ever heard of?

A. No, sir.

Q. And you had some suspicion about the man who took the box?

A. Yes, sir.

Q. What was the name of the man you thought took the box?

A. Well, we didn't know the name.

Q. Did your know his color?

A. Yes, Sir.

Q. Is he a man who had been there before?

A. Yes.

Q. And was he a man *there* who was accustomed to come to get freight?

A. Very rarely.

Q. Well, he did come sometimes to get freight and take it away?

A. Yes.

Q. Did you have a suspicion about that man?

A. Yes, sir.

Q. Well, did you watch him pretty closely when he came there?

A. Well, we had no suspicion before, not until after this occurred.

Q. Well, how do you think it was he got that box out of the depot without your men stopping him?

A. Well, this man backed up for a little household goods and this man that was delivering to him went down about three doors below to give him a box.

Q. Don't understand that?

A. This man——

Q. What man?

A. This colored man that we suspected took this box, he came there for a little load of household goods and one of the boxes was down in what they call the M pile, and this delivery man went down there with a truck to get it, and he brought it up and gave it to him on the wagon, and as the colored man drove off, and this man came in, this box was found missing within about two minutes.

Q. Are you testifying what you saw yourself?

A. No.

Q. Testifying what somebody told you?

A. Yes, what this man told me; he came right upstairs and notified me, asked me to look at this pile, see what was the matter. He said "Do you see anything the matter with this pile here?"; I says,

"Yes, one of those boxes of household goods that has been
66 here a long time is missing." "Well", he says, "a colored man I think has just taken it," I called up our Captain of Police immediately.

Q. Well, did this colored man have a bill of lading or order, something of that sort for certain goods?

A. Yes, sir.

Q. And somebody in your establishment there permitted the colored man to take goods which were not covered by this bill of lading?

Objected to by defendant. Sustained.

Q. The man did take goods that——

The COURT: He has undertaken to say the man was under suspicion as having taken them but that is a different question than having permitted him to take them.

Q. Is it a common thing for people to come to your place there and get goods that don't belong to them?

A. No, very rarely, very rarely we miss goods down there.

Q. Well, there wasn't any particular reason why a colored man should be allowed to take the goods that didn't belong to him, was there?

Objected to by defendant. Sustained.

Q. What do you say about that?

A. I am not saying that he took it; we only suspected he took it.

Q. You don't know whether it was a colored man that took the goods after all?

A. We only suspected.

The COURT: He wasn't arrested was he?

The WITNESS: No, Your Honor.

Mr. FOOTE: His house was searched, wasn't it?

The WITNESS: Yes, sir.

Q. Now, Mr. Andrews, it is the testimony here in this case of the parties who boxed and shipped these goods and of the freight agent at Denver, that there was three boxes of goods and that one of them was a large box and a heavy box and that the other two were smaller boxes and about the same size, and the bill of lading that you have there is identified as the bill of lading which was given at the time those boxes of that description, one large box and two smaller sized boxes?

A. Yes.

Q. And further evidence is that the boxes which were
67 finally taken away from your depot were two boxes of the same size precisely; now, that is the testimony of the various witnesses and I want to ask you Mr. Andrews, if in view of that situation and the other circumstances and the time that has intervened and a great number of matters you have to look after along this line, if you don't think you may be mistaken in regard to this box which was missing——

A. No, sir.

Q. —Being a small box?

A. No, sir, I handled the box there two or three times myself and the other two boxes that were left I couldn't handle myself, they were too big.

Q. Where were the three boxes when you first saw them?

A. Right in the pile, what we call the egg pile, that is where we keep all perishable goods, that is where we pile our eggs and butter; occasionally there may be other stuff there.

Q. Now, which box was on the bottom?

A. Two of the boxes were large boxes and they were piled on the

bottom, one on top of the other and the small one on top of the other two.

Q. And when did you see them next?

A. Oh, I passed them about twenty, oh, from twenty to thirty times a day, at the very least.

Q. How were they lying then?

A. They were the same way.

Q. You mean to say that the position of them was never changed?

A. No, sir, they wasn't moved; they was standing against just a little rail that you passed through, and leaned against, put right against a rail, about two-inch railing. Anyone see them at any time they go by, they couldn't help but notice them.

Q. How many different times do you recall of having seen and noticed these three boxes?

A. Well, I go downstairs about 20 or 30 times a day anyway, and oft-ner than that.

Q. Well, did you see those boxes every time?

A. Yes, they were right there in plain view.

Q. Remember now of seeing them every time?

A. Yes, in plain view all the time, nothing else piled near them.

Q. And your understanding is now, as we understand it, that the two boxes, there were two boxes about the same size?

A. Yes, sir.

Q. Exactly the same size?

A. Almost the same size, very little difference; may have been an inch or two difference.

68 Q. And you never weighed either one of those boxes?

A. No, sir.

Q. Did you ever lift either one of those boxes?

A. I lifted the small one but I couldn't lift the other two.

Q. Couldn't lift the other two?

A. No.

Q. When did you try to lift the other two boxes?

A. Tried two or three times to examine the boxes for marks, because any old freight on hand, I make reports on claims, and I had to get another man each time to turn the boxes over. The small one I remember distinctly of handling myself.

Q. When did you handle that?

A. I couldn't say the date; it was between the time after the arrival and delivery.

Q. You remember when those two boxes were removed from your place?

A. I could not say the date without looking, but the expense bill shows they were delivered November 6th.

Q. You didn't go down there and point out to the teamster who came there, those two boxes at the time?

A. No, not to the teamster, no.

Q. You didn't see those two boxes on that day, so far as you remember?

A. No, I couldn't say what date, only by what the report shows.

Q. You have no recollection now of having noticed the two boxes the day before they were removed?

A. Yes.

Q. What?

A. Yes, sir, as I passed them right along.

Q. Well, I know, but I am not asking you to testify what you did from day to day, but at this time do you have any recollection of having noticed those two boxes on the day before they were removed?

A. Well, what I mean to say, as soon as they were gone, I missed them because, like passing this desk here, you have to clear one side to pass these boxes.

Q. Your attention wasn't called to the fact then that when this teamster did come and find these boxes, it did take quite a while to locate the boxes; you don't know anything about that?

A. No, sir.

Q. And there was nothing occur-ed the day before, so far as you remember, about these boxes?

A. No, sir.

Q. Nor the day before that?

A. No, sir.

69 Q. Nor the day before that?

A. No, sir.

Q. But you simply have the idea now, Mr. Andrews, that when the boxes would go out, that then your attention would be called to that?

A. No, sir, I would miss them, miss this particular shipment; all the overs, you know, on hand I keep track of.

Q. You would get them checked off your list?

A. Yes, sir.

Q. Who was the man that told you that this particular box was missing at a certain time?

A. Didn't tell me; asked me to come down and look at the pile and see what was the matter.

Q. What was his name?

A. They call him Pat.

Q. Where is he?

A. He is at the Front street depot.

Q. How long has he been in your employ—of the company?

A. Oh, he must have been there for twelve years.

Q. What time in the day was it he came to you?

A. Must have been a few minutes before eight o'clock in the morning.

Q. So you hadn't seen that box that was missing on that day,—you hadn't seen it on that day?

A. Well, I wouldn't be certain; well, yes, I had; I remember going down to the cashier twice that morning.

Q. But do you have any recollection of having looked at it or seen this box?

A. Yes, sir, I remember very distinctly that morning.

Q. Now, Mr. Andrews, there was nothing unusual occurred about

this box until it was reported missing, that was the first unusual occurrence, wasn't it.

A. Yes.

Q. And you don't mean to say that in going down past those rows of boxes from time to time, that you would get some impression in your mind of any particular box, that you would afterward remember that box?

A. No, what I am saying, these boxes were piled where other merchandise wasn't piled.

Q. Why don't you answer my question; how is it that you claim to have a recollection of that box on the day before it was removed—taken?

A. Because it was an old box and I always looked after old boxes, what is on hand.

70 Q. You just believe that from the course of business that you had there, that you must have seen it?

A. Yes.

Q. But you don't remember of having seen that box that morning?

A. That morning, sir, when the man came up and asked me to look at the box, look in the pile, he says, "What is the matter with that pile?"; I says, "There is a box missing," I says right away: "That box was there fifteen minutes ago when I passed to the cashier's office, that is the words I said to him. If those boxes had been piled in a regular pile, I wouldn't have noticed them at all.

Q. So that you think that box was taken out on that mo*rn*ring?

A. Yes, sir.

Q. About what time of the day?

A. Just before eight o'clock; it must have been taken out between 7:45 and 8:00 o'clock.

Q. You have some kind of a system when goods go out, to have somebody to check them over?

A. Yes, sir.

Q. Examine the goods and compare them with the bill of lading?

A. Yes, sir.

Q. You did have some——

A. Yes, sir.

Q. Well, that system wasn't followed in reference to this particular box, was it?

A. No, because the man stole it.

Q. He took it out then, from under the nose and eyes of your employees?

A. No, the man turned his back to go to another pile and he just carried it out.

Q. Were you there, did you see your man turn his back?

A. That is the only way they could get away with it.

Q. You testify to things which you think must have happened but you don't know anything about the circumstances how that happened; you don't know whether this colored man took it or whether one of your employees took it?

A. No, not so far as that goes.

Q. You don't know how it happened yourself?
A. Only what we supposed.
Q. And it is true that if the men that you have there to look after your freight had taken care of these goods, why this box wouldn't have been lost, that is true, isn't it, that is right?

The COURT: It is for the jury to say.

Q. You told Mr. Dettelbach that his box had been taken on the 20th of September, didn't you?
71 A. I didn't give him the date; I told him when he came down, I told him it had been taken either that day or the day before, I am not sure whether Mr. Dettelbach came down that same day or the day after, I wouldn't say that.
Q. You mean you told him the box had been taken the day before Dettelbach came there?
A. Either that day or the same day.
Q. He didn't come until October, did he?
A. I couldn't say when he did come, but the box had just been stolen when he came. We had that box on hand there nearly three weeks before it was stolen.

Redirect examination.

By Mr. FOOTE:

Q. You say that these three boxes were piled where no other freight was?
A. Yes.
Q. It was inside the freight depot?
A. Yes, sir, it was a space about half as big as this room here, what we keep for perishable goods and these three boxes were piled just like this railing (indicating railing before jury box), but open railing, right ag-inst the rail; as you walked down this end the boxes were piled by this two-foot rail; separated them from you. Every time, if you lift your arm up, you will brush your arm against, every time you go by.
Q. Now, will you tell the jury why it is you remember so distinctly about these boxes; what is the reason you remember?

Objected to.

Q. To what circumstances or what fact, why you should remember these three boxes—anything special or different about those boxes, different from other freight in the depot?
A. The first time—it was unusual to pile——

The COURT: Testified to that several times, unusual place.

Q. I mean an unusual feature?
A. After the goods were on hand for over seven days I examined these boxes to find out whether any address and what is the matter; the ca*h*ier hadn't notified them or why the party hasn't called or if they have made any inquiries about their freight.
Q. Your reason for handling them was because you were endeav-

oring to find out where they belonged in order to get the delivery of them?

A. That is right, whether they showed any address and if
72 showed any address, whether the cashier had correctly notified them.

Recross-examination:

Q. I would like to have you tell again—probably you did and I didn't understand—the dimensions of the two boxes which you finally delivered to Mr. Dettelbach?

A. Well, I explained the two boxes, about the size of that desk there.

The COURT: He has done that several times.

Q. Now the other box was——

A. About half the size.

By Mr. FOOTE:

Q. This document marked "Defendant's Exhibit 2," whatever the number is, handed to you by counsel for plaintiff, is a carbon copy of your over and short report which has been referred to in your testimony?

A. That is my own report, right there.

Mr. FOOTE: We offer it in connection with the examination of the witness.

Which said document marked "Defendant's Exhibit 2" is hereto attached and made a part of this Bill of Exceptions.

By Mr. YOUNG:

Q. You had some talk with Mr. Dettelbach about there having been some boxes of shoes near where this missing box had stood and also clothing?

A. No, sir.

Q. There were some other boxes there, weren't there?

A. No, sir; what I am saying, there were no other boxes near it.

Q. No other boxes near these three at all?

A. No, sir.

Q. These stood alone?

A. Yes, stood right against the rail, where you pass through; you could brush them with your elbow every time you passed if you lifted your elbow.

Q. Where were the nearest boxes in your warehouse there to these three particular boxes of Mr. Dettelbach?

A. Oh, they must be away twenty to thirty feet.

Q. Then what did you come to then, what kind of boxes?

A. Eggs and butter.

Q. And what else?

A. Eggs and butter, that was all.

Q. And then what were the other boxes next nearest to the Dettelbach's?

73 A. After that they were what they call the gangways and the freight would be on the other side of the gangways.

Q. What kind of freight was there?

A. Merchandise.

Q. Boxes?

A. Yes.

Q. What was the size of those boxes?

A. Oh, all sizes.

Q. You remember them, now just what was there, do you on the day that Mr. Dettelbach's box was missing?

Mr. FOOTE: You mean where?

Q. Beyond the gangway?

A. No, because there was a great many.

Q. How many boxes did you have in the warehouse altogether on that day?

A. Perhaps several thousand.

Q. And what was the biggest one?

A. I couldn't tell you.

Q. What was the littlest one?

A. Perhaps weigh half a pound and biggest one perhaps weigh 80 pounds.

Q. And there were various boxes there that were awaiting delivery?

A. Yes, sir.

Q. You have on hand, I suppose, several hundred of those boxes?

A. Yes.

Q. At one time, and you have to keep track of them?

A. Yes, sir.

Q. And you haven't any memorandum, never did make any memorandum in regard to the size or weight of these three Dettelbach boxes?

A. No, sir.

Q. And all you have said here before this Court and jury is what you think you recall about that situation without the aid of any memorandum?

A. Well, you see any stuff on hand——

Q. Just answer it.

Mr. FOOTE: Let him answer it.

Q. That is all.

By Mr. FOOTE:

Q. What further answer were you going to make?

A. Any freight on hand over seven days, of course my particular attention is called perhaps for a week; we may not have any stuff on hand over seven days, all delivered in the meanwhile.

Q. You don't have several hundred boxes on hand then that are over and short?

A. No, sir, perhaps may not have five shipments over seven days on hand.

74 Q. So that you don't have to keep in mind several hundred boxes?
A. No, sir, only after they have been on hand seven days.
Q. Some time you won't have any and sometimes four or five?
A. That is it.

The COURT: Anything further?
Mr. YOUNG: That is all.
Mr. FOOTE: Unless we get Mr. Billington; I wouldn't ask the Court for the privilege of that—we couldn't reach him.

Defendant rests.

Rebuttal.

Whereupon to rebut the evidence offered by the defendant, the plaintiff, EDWARD DETTELBACH, offered himself as a witness and having been previously sworn, testified in rebuttal as follows:

Direct examination.

By Mr. YOUNG:

Q. Mr. Dettelbach, when you had a conversation with Mr. Andrews at the freight house, you may state whether or not he said to you that there were some other boxes, shoes and clothing, standing near these particular boxes of yours?

To which question the defendant objected.
Qustion withdrawn.

Q. Mr. Dettelbach, what did you see in regard to other boxes near where the two boxes of yours were standing.
A. Seen two boxes standing near the platform and a lot of other boxes all the way around them; you couldn't get near them.
Q. There was only the one time when you saw the boxes in the warehouse?
A. One time with Mr. Andrews.
Q. And was there a talk between you and him with reference to other boxes there, was it mentioned by him as to some other boxes?

Objected to. Sustained.

Q. Mr. Dettelbach, will you tell again the size of the two boxes which you saw in the warehouse and which afterward were brought to your house?
A. There were two boxes about half the size of that, about half the depth and just about as long as that stand that the stenographer is using.
75 Q. And how much did both of those boxes weigh?
A. I don't suppose they weighed over 125 pounds hardly.
Q. You mean, apiece, or both together?
A. Both of them together; the man had the two under his arm and walked up two flights of stairs.
Q. And is it true those two boxes were the same size?
A. Yes, sir.

Q. Now, in regard to the box in which you stored your blankets and rugs, as you have just stated, will you tell more particularly, give more particularly the description of those boxes?

Mr. FOOTE: I supposed that was all covered.

Mr. YOUNG: Then I ask in view of this issue we go into it briefly; he didn't discuss the box very fully.

The COURT: I don't remember; he told something about having an iron band around it.

Mr. FOOTE: I don't recall it.

A. The box was about four feet square, about three feet six high, as near as I can get at it, and it was bound all around on both ends with iron; impossible for anybody to get in.

Latter part of answer stricken out.

Q. Do you recall where you procured that box?

Objected to. Sustained.

Cross-examination.

By Mr. FOOTE:

Q. Mr. Dettelbach, you don't agree as to the weight of boxes then with the drayman, Mr. Plotz?

Objected to.

Q. You didn't agree with Mr. Plotz ,the drayman, who says the weight was 130 and 135 pounds on the two boxes?

Objected to. Sustained.

Mr. YOUNG: That is all our testimony.

Whereupon the plaintiff rested.

Whereupon the defendant rested.

The above and foregoing, together with the Exhibits hereto attached was all of the evidence offered or given by either party
76 on the trial of the above cause.

Defendant's Motion.

Mr. FOOTE: I desire to interpose a motion at this time to direct a verdict for the defendant; first, I make it for the defendant without any limitation at all.

Which said motion, was, after argument by counsel, overruled by the court, to which ruling of the court the defendant then and there duly excepted.

Defendant's Requests to Charge Before Argument.

1.

Defendant at the conclusion of all the evidence and before arguments to the jury by counsel, requests the court in writing to instruct the jury before argument as follows, to wit;

Even if the jury find for plaintiff in this case the amount of such verdict shall not exceed the sum of ten dollars ($10.00) per hundred weight of the goods claimed by plaintiff to have been lost and included in the shipment covered by the bill of lading in evidence in this case.

2.

In no event can the jury in this case find for plaintiff in a greater sum than $10.00 for each one hundred pounds of the weight of the goods shipped by plaintiff under the bill of lading, "Plaintiff's Exhibit 1," from Denver Colorado, to Cleveland, Ohio, part of which are claimed by plaintiff to have been lost.

The COURT: I refuse to give the requests before argument that have been offered by the defendant.

Mr. FOOTE: Exception.

Defendant's Requests to Charge After Argument.

The defendant respectfully requests the court to charge the jury as follows:

1.

If the evidence in this case shows that the goods in controversy were stolen from defendant's depot while held by it as ware-
77 houseman, such evidence would be sufficient to overcome any prima facie case made by plaintiff from the mere fact of non-delivery of such goods and in the absence of any other evidence tending to show negligence on the part of defendant to exercise ordinary care in respect to caring for said property while in its possession as such warehouseman, plaintiff would not be entitled to recover from defendant.

2.

If the jury find from the evidence in this case that the goods claimed by plainitff to have been lost, came into the possession of defendant as warehouseman and while so held by it were stolen from its depot or warehouse, then before plaintiff can recover the jury must find from the evidence that they were so stolen because of the failure of defendant to exercise ordinary care with respect to the keeping of said property while so in its possession.

Whereupon after argument by counsel, the Court charged the jury as follows:

ESTEP, *J.*:

Gentleman of the jury, give me your attention for a little while and I will undertake to define the issues in this case to you as well as I can and give to you such law as I think is applicable to the facts in the case, as you may find them to be.

Plaintiff sues the defendant and seeks to recover for the loss of

certain household goods, merchandise, consisting of rugs, blankets and shawls and other articles which are enumerated in an account-statement which he has attached to his petition, marked "Exhibit A" and which he claims that on or about the 1st of November 1911 were in the possession of the defendant in its warehouse in Cleveland, Ohio. He charges that the defendant in addition to being a railway company engaged in the business of a common carrier of freight and passengers, was also a warehouseman, and charges that on or about the 18th day of September 1911, these goods which were received here, were brought in three boxes and shipped from Denver, Colorado, over The Chicago, Burlington & Quincy Railway, being consigned to Mrs. E. Dettelbach, the wife, of the plaintiff at Cleveland, Ohio; and that they were transported by The Chicago,
Burlington & Quincy Railway and other carriers until they
78 came into the possession of the defendant at Cleveland; and
that there were certain freight charges upon the goods, which were duly paid; and that upon the arrival of the goods in Cleveland the defendant failed to give the plaintiff or his wife immediate notice thereof; and that such goods and merchandise, without any fault of the plaintiffs remained in the possession of the defendant as a warehouseman for a considerable time after such carriage had terminated.

He further charges that on or about the 1st day of November, 1911, by reason of the carelessness and negligence of the defendant in failing to safely keep and protect such property while in its possession, the same was stolen from its warehouse by reason of which the plaintiff, without any fault on his part, sustained damages in the sum of $2792.00; and that he filed his claim with the defendant within the time prescribed in the bill of lading and the defendant refused to pay the claim; therefore seeks to recover a judgment against the defendant in the sum of $2,792.00 and interest from November 1-1911.

To this complaint the defendant has answered, admitting that it is a common carrier of freight and passengers and in connection therewith acts as a warehouseman; on or about the 18th day of September 1911, certain articles described as household goods were shipped from Denver, Colorado, by The Chicago, Burlington & Quincy Railway, consigned to Mrs. E. Dettelbach, Cleveland, Ohio, that such goods were transported to Cleveland, Ohio, and the consignee thereof had failed, upon notice given, to remove the same, the same remaining in possession of the defendant as warehouseman. Further answering, defendant denies each and every other allegation in the petition contained except such as are herein specifically admitted.

The second defense is a statement of certain matters with the bill of lading and certain matters of law with reference to the value of the goods and the result of the second defense as pleaded is to the effect that if the plaintiff would be entitled to recover in this action at all, he would be only entitled to recover the value of $10.00 per hundred weight of these goods; that defense the Court has already disposed of in your presence, I think, by simply holding that the

measure of damage would be other than that stated, which I will undertake to state to you later.

The plaintiff in error to recover in this case must show you by the greater weight of the evidence—the preponderance of the
79 evidence that the defendant at the time these goods were lost or stolen, as the case may be, was holding them as a warehouseman and must show you that the loss of these goods or the failure of the defendant to restore the goods to him was owing to its negligence and carelessness; that is, that the warehouseman at this time was not in the exercise of ordinary care. As has been stated in your hearing during this trial several times the degree of care that devolves upon the defendant in the transportation or bringing of these goods from Denver, Colorado, to Cleveland, Ohio, and for a reasonable time thereafter; when acting as a carrier the degree of care was much greater than that imposed upon it as a warehouseman; in transporting the goods they practically act as an insurer, that is, while bringing them as a carrier, but as a warehouseman the duty imposed upon the defendant, if you find at this time they were acting as a warehouseman, that is, at the time these goods were taken away from them, was only the exercise of ordinary care. It is charged that they were negligent at that time in that they were not exercising ordinary care to take care of and protect this property as a warehouseman.

There are a great many definitions of negligence, one of the simplest I know of to the effect that negligence is simply the absence of ordinary care; a person may do something that they ought not to do or they may fail to do something which they ought to do; in either event they would be negligent, depending somewhat upon the circumstances always but that is a general definition, that is, the absence of ordinary care. Ordinary care is just such care as prudent persons use under the circumstances connected with the transaction they are called upon to pass upon; in other words, it is such care as prudent persons would exercise under the circumstances in which the person whose conduct you are to investigate is placed. So that if this defendant—and you find from the evidence that this defendant at the time these goods were taken from its custody was in the exercise of ordinary care, as I have defined that to you, in taking care of this property, then there would be no liability on their part and the plaintiff could not recover. If you find, gentlemen, from the preponderance, the greater weight of the evidence in this case, that the goods were in the possession of the defendant as a warehouseman and that the defendant failed and neglected
80 to deliver the goods to the plaintiff upon demand by him that would constitute what is known in law as a prima facie case of negligence; that is, if there was no testimony introduced in the case, and the defendant introduced no testimony upon the subject of its failure to deliver the goods, then the plaintiff would be entitled to recover upon the ground, of negligence, that is his prima facie case would be a complete case. The prima facie case simply raises a presumption of negligence which is rebuttable; it can be overcome by testimony and is overcome when the defendant offers evi-

dence upon the subject of the disappearance of these goods, which equalizes the testimony of the plaintiff. In other words, it is only required to counterbalance the testimony or equalize it in order to overcome the prima facie case or overcome this presumption of negligence which is raised by the failure of the defendant to restore the goods to the plaintiff upon his demand. So that if you find from the evidence in the case that the defendant has introduced testimony regarding the failure on its part to deliver these goods to the plaintiff which equalizes this presumption, then it devolves upon the plaintiff to go further, and show that at the time of the disappearance of these goods, that the defendant was not in the exercise of ordinary care in their control or in their keeping, as I have undertaken already to define that to you.

I have used the words "preponderance of evidence, greater weight of evidence" words that mean the same thing; that don't mean that more witnesses testify on one side than on another, it just simply means that as you weigh all the testimony in the case, it is that testimony which has the most convincing force and effect on your minds and on your judgment, that is the testimony that constitutes the preponderance or the greater weight of the testimony; it is the more convincing testimony in the law-suit; so that when you are instructed that the burden is upon plaintiff to make out his case by a preponderance or greater weight of the evidence it simply means that evidence introduced by him must have the more convincing effect upon your minds in the determination of the question as to his right to recover.

Now, if you find, gentlemen, under all the testimony in the case and by the preponderance of the testimony that the defend-
81 ant acting as warehouseman, failed to deliver these goods to the plaintiff upon his application on account of its failure to exercise ordinary care in taking care of these goods, then your verdict should be for the plaintiff in this case. And as I have said before, if you find from all the evidence in the case that the defendant, acting as warehouseman, was exercising ordinary care in holding these goods, under all the circumstances of the case, and they were lost without its fault or without its neglect, then the plaintiff has no right to recover, and your verdict should be for the defendant.

Something has been said here, I don't know as it is necessary for the Court to say anything about it, in regard to the fact that the defendant is a railroad corporation, etc. I take it, gentlemen, that you will give this case just as fair consideration as you would any case between man and man; I assume that you will do that. Now, you are to decide this case upon the testimony as has been given here in court and upon such instructions as the Court undertakes to give to you; it is your duty to weigh this testimony, consider it all, both the testimony by deposition and the testimony that has been given orally before you in court, and give to that testimony just such weight as in your best judgment you think it is entitled to. You have full power to weigh this testimony and determine its credibility and give credit to it as you in your best judgment see fit.

Now, if you find for the plaintiff under these instructions and under the evidence in the case, then I say to you that the plaintiff will be entitled to recover the fair market value of such goods, with interest from the time they should have been delivered to plaintiff; plaintiff states in his petition that was the 1st of November 1911; I will leave that stand as the date; there is some little controversy here, 6th of November, I think he was there and didn't get the goods. So that as I have said, if you find for the plaintiff, you will ascertain from the testimony in the case the fair market value of the goods that were lost or not recovered by him from the Company and allow interest on it from the 1st of November, 1911, up to the first day of this term of court, which was the 2nd day of April 1913.

I have been requested to give two instructions, I almost forgot them; they are not numbered; I will number them myself.

82 I refuse Number 1 and I will give Number 2.

"If the jury find from the evidence in this case that the goods claimed by plaintiff to have been lost, came into the possession of defendant as warehouseman, and while so held by it were stolen from its depot or warehouse, then before plaintiff can recover the jury must find from the evidence that they were so stolen because of the failure of defendant to exercise ordinary care with respect to the keeping of said property while so in its possession."

You will have with you, gentleman, two forms of verdict, usual forms, one for the plaintiff with a blank amount, and the other a plain verdict for the defendant. When you retire you will elect one of your number foreman, and have him sign the verdict when you have agreed upon it.

Defendant's Exceptions.

Defendant excepts to the refusal of the court to give Defendant's Request Number 1.

Defendant excepts generally to the charge of the court under the statute.

Thereupon, the jury rendered a verdict in favor of the plaintiff, as appears by the record herein; to which the defendant then and there duly excepted.

Whereupon the defendant duly filed its motion for a new trial, which is part of the record herein for the reasons and upon the grounds therein stated; and on the 27th day of June, A. D. 1913, said motion for a new trial came on to be heard by the Court and was argued by counsel; on consideration whereof the Court overruled the same; to which the defendant then and there duly excepted; and thereupon the Court entered judgment against said defendant in accordance with said verdict, as appears by the record herein; to which the said defendant then and there duly excepted.

And thereupon on the 5th day of August A. D. 1913, being within forty days after the over ruling of defendant's motion for a new trial, said defendant filed with the clerk of said Court, this, its

Bill of Exceptions, and prays that the same may be allowed and signed by the Trial Judge and filed as a part of the record of this cause, but not spread at large upon the minutes, according
83 to the statute in such case made and provided, the receipt of which is hereby acknowledged this 5th day of August A. D. 1913.

EDMUND B. HASERODT,
Clerk of said Court,
By H. L. NICHOLAS,
Deputy Clerk.

And thereupon, on the 23d day of August A. D. 1913, the trial judge being absent from the District from the 15th day of July, 1913, to the 23rd day of August, 1913, this bill of exceptions was duly transmitted to the said Trial Judge by the Clerk of said Court, together with all objections and amendments filed thereto, the receipt of which is hereby acknowledged this 23rd day of August A. D. 1913.

C. J. ESTEP,
Trial Judge.

And now, upon the 26th day of August, 1913, being not more than five days after the receipt of said Bill of Exceptions from said Clerk, and upon due consideration of the same and the objections and amendments thereto, said Bill of Exceptions is hereby allowed and signed by the Court, and ordered to be made a part of the record of this cause, but not spread at large upon the minutes, according to the statute in such case made and provided, and it is ordered that the same be transmitted to the office of the clerk of this court forthwith.

All of which is accordingly done as of said Term, and so ordered and directed.

C. J. ESTEP,
Trial Judge.

PLAINTIFF'S *Defendant's* EXHIBIT 1.

Chicago, Burlington & Quincy Railroad Company,
Burlington Route.

Bill of Lading—Exact Copy of Original.

Face of Bill of Lading.

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.
84 Form 86, Burlington Route. This Company does not accept for Transportation Money, Gold, Silverware, Valuable

Papers or Paintings, nor any articles of Extraordinary Value, unless Special Arangements are made.

Chicago, Burlington & Quincy Railroad Company.

Shipper's No. 3018.
Agent's No. —.

Geo. H. Crosby, Freight Traffic Manager, Chicago.
E. R. Puffer, General Freight Agent, Illinois and Iowa Districts, Chicago.
C. E. Spens, General Freight Agent, Lines West of Missouri River, Omaha, Neb.
W. Gray, General Freight Agent, Missouri District, St. Louis.

Bill of Lading—Original.

Received, subject to the classifications and tariffs in effect on the date of issue of the Original Bill of Lading, at Denver, 9-18 191—, from Mrs. E. Dettelbach, the property described below, in apparent good order, except as noted (contents and condition of contents of packages, unknown), marked, consigned and destined as Indicated below, which the Chicago, Burlington & Quincy Railroad Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

Cars detained are subject to the rules and regulations published by this company.

Consigned to Mrs. E. Dettelbach.
Destination Cleveland, State of Ohio, County of —.
Route, Gen. Del.

Number of packages.	Deseription of articles.	Weight, subject to correction.
3 Bx.	H. H. Gds.	260 330 590

Orignal—Not Negotiable.

I hereby declare the valuation of the property shipped under this Bill Lading does not exceed $10.00 per cwt. (Signed) Langton Brs. Copy. Exact Copy of the original Bill of Lading. C. W. Loomis, Agt. per J.

85 Received $14.01 to apply in prepayment of the charges on the property described hereon.

F. E. WELCH, *Agent.*

This Bill of Lading is accepted by consignor with full knowledge of all its conditions.

An Exact Copy of the Back of the Bill of Lading.

Conditions.

SEC. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as herein after provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such requests; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general customs, on account of the nature of the property or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

SEC. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of
86 lading shall be deemed to exempt the initial carrier from any such liability so imposed.

SEC 3. No carrier is bound to transport said property by any par-

ticular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after deliver[illegible]f the property, or, in case of failure to make delivery, then with[illegible]our months after a reasonable time for delivery has elapsed. [illegible]less claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

SEC. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect for ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

87 SEC. 5. Property not removed by the party entitled to receive it within forty eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for detention of any

vessel or car, or for the use of tracks after the car has been held forty eight hours (exclusive of legal holidays), for loading and unloading and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail to water
88 route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the conditions that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosions, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and to be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property. The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lakes or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

SEC. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

89 PLAINTIFF'S EXHIBIT 2.

Freight Bill.

Consignee: Mrs. E. Dettelbach.

CLEVELAND, Sept. 27, 1911.

To C., C., C. & St. L. Ry. Co., Dr.

For charges on articles W. B. from Ch'go, Ill., via L. C. Ry.

Way Bill Reference.

Date: 9-23.
Number: 38316.
Car Initial and Number: 66615.
Consignor: P. R. R.
Original Point of Shipment: Denver, Col.
Articles and Marks: 3 BX HH GDS.
Weight: 590.
Freight: Paid.
Postal Notice: Sep. 28, 1911.
Postal Notice: Oct. 9, 1911.
Postal Notice: Nov. 2, 1911.
Received payment: Nov. 6, 1911. C. C. C. & St. L. Ry. Co.
A. I. Ehrler, Ag't.
Delivered: Nov. 6. 1911. Front St.

(*Note on Back.*)

NOTE.—When it is impossible to make collection so as to include same in current month's accounts, the Agent or Cashier will see that proper entry is made on his records stating in short the reasons given on this blank why the item is uncollected. This will furnish the information from which to make explanation opposite each item on your uncollected statement. Claim for Loss, Damage or Delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property; or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

PLAINTIFF'S EXHIBIT 3.

"Big Four Route."

New York Central Lines.

90 The Cleveland, Cincinnati, Chicago & St. Louis Railway Co.

The Peoria & Eastern Railway and Dayton & Union R. R.

The Cincinnati Northern Railroad.

Accounting Department.

Office of the Freight Claim Agent.

Claim No. 205644.

CINCINNATI, O., Dec. 21, 1911.

Carpenter, Young & Stocker, Cleveland, O.

GENTLEMAN: I refer to your favor Dec. 2nd enclosing claim against us in favor of Edw. Dettelbach covering loss one box HH goods $2,792.00.

We regret to inform you that we are not in a position to entertain this claim for any such amount as the original contract entered into at the time this shipment was delivered C. B. & Q. provides that in case of loss or damage to the shipment, the carriers were not to pay in excess of $10.00 per cwt. By accepting this released valuation your clients procured the benefit of a lesser rate that he would otherwise have obtained.

Under the circumstances the maximum amount for which we are liable must not exceed $10.00 per c'w't. If you will advise me the actual weight of this 1 box which checked short, and reduce your claim to value of same on basis of $10.00 per cwt., we will arrange to issue voucher.

Yours truly,

J. P. BOISSEAU.
F. C. A.

ppf-h

PLAINTIFF'S EXHIBIT 4.

The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

New York Central Lines.

Cleveland, O.; Front St. Depot.

The following property from Denver, Colo., is now ready for delivery to you upon receipt:

3 B'x's H. H. Goods.

Third Notice.

A. J. EHRLER, *Agent.*

91 This Company will not be responsible as a common carrier or warehouseman after 24 hours have elapsed from time of arrival of shipment, and goods will be delivered to public warehouse at your expense if not removed within three days. Carload freight will be subject to Car Demurrage Charges if not removed within free time under Car Demurrage Rules.

Deliver above specified property to bearer.

This Freight, if not removed, will be stored Nov. 4, 1911, at owner's risk and expense, at a public storage warehouse.

Sign Here —— —— *Consignee.*

DEFENDANT'S EXHIBIT 2.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Co.

The Peoria & Eastern Railway Company.

The Cincinnati Northern Railroad Company.

Duplicate Report of Freight Over, Short or Damaged.

Sta. Claim 13101.

This report must not be regarded as an excuse for neglecting to use all other known means of rectifying errors.

CLEVELAND, O., Dec. 4, 1911.

No. S. 2930.

The following freight is short at this Station from Car No. 66615: initials, P. R. R. Sealed East or North J. P. West or South J. P. Way-Bill No. I 38316, from Chicago, Ill., Sept. 23, 1911.

As Way-Billed.

Consignee and Destination: Mrs. E. Dettelbach, Cleveland.
Articles Way-Billed, 3 B'x- H. H. Goods.

As Received.

Shipment unloaded here Sept. 27, 1.30 P. M. under J. P. seals and checked 3 B'x's in good order, 1 B'x found missing from Depot.

92 This form is intended for use as a carbon copy of Form 1309. In the case of Overs which are checked from cars bearing foreign road seals, it must be forwarded to the Agent of road from which car was received, otherwise it may be retained for office copy.

Special officer notified immediate. 2 B'x's delivered to Consignee Nov. 6 in good order.

A. J. EHRLER, *Agent.*

Agent receiving this report will forward it promptly to the transfer, or originating point, as may be necessary. If information is required at destination, return it direct to Reporting Agent.

These 2 B'x's was examined by our special Officer several times, did not show any evidence of re-cooperage; no complaint on delivery except shortage of one box.

93 STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals Eighth District.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff-in-Error,
vs.
EDWARD DETTELBACH, Defendant-in-Error.

Petition-in-Error.

Plaintiff-in-error says that at the April term, A. D. 1913, of the Court of Common Pleas of Cuyahoga County, Ohio, defendant-in-error by the consideration of said Court recovered a judgment against plaintiff-in-error in an action then pending therein, wherein plaintiff-in-error was defendant and defendant-in-error was plaintiff, a transcript of the docket and journal entries whereof is filed herewith, together with all the original papers, exhibits and bills of exceptions.

Plaintiff-in-error says there is error in said record and proceedings in the following to wit:

1. That the verdict and judgment of said court is contrary to law.

2. That said verdict and judgment is not sustained by sufficient evidence and is against the weight of the evidence.

3. That said court erred in admitting testimony offered by plaintiff over the objection of defendant, to which defendant at the time excepted.

4. That said court erred in excluding testimony offered by defendant and excepted to at the time by defendant.

5. That said court erred in overruling the motion of defendant to direct a verdict for defendant at the conclusion of all the testimony.

6. That said court erred in refusing to give to the jury before argument instructions Numbers 1 and 2, as requested by defendant in writing at the conclusion of all the testimony and before arguments to the jury.

7. That said court erred in overruling the motion of de-
94 fendant for a new trial.

8. That said court erred in refusing to instruct the jury as requested by defendant after arguments in its request Number 1.

9. That said court erred in its charge to the jury.

10. That said verdict and judgment is in violation of the constitution of the United States, and particularly Article I, Sec. 10,

thereof, by impairing the contract rights of defendant and for the same reason is a violation of the constitution of the State of Ohio, particularly Article II, Sec. 28 thereof.

11. That said verdict and judgment is in violation of the Act of Congress of the United States entitled "An Act to Regulate Commerce" passed February 4, 1887, and the various amendments thereto, commonly known as the Interstate Commerce Act.

12. That said verdict and judgment is excessive.

13. For other errors and irregularities appearing upon the record.

Wherefore plaintiff-in-error prays that said verdict and judgment of the Common Pleas Court be reversed and that it be restored to all things lost by reason thereof and that this court now enter judgment for this plaintiff-in-error.

COOK, McGOWAN & FOOTE,
Attorneys for Plaintiff-in-Error.

Waiver of Summons-in-Error.

Defendant-in-error hereby waives the issuance and service of summons-in-error in the above entitled action and hereby enters his appearance on this 28th day of August, 1913.

CARPENTER, YOUNG & STOCKER,
Attorney- for Defendant-in-Error.

95 THE STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals of Cuyahoga County, January Term, 1914.

C. of A. No. 339, C. P. No. 128886.

In Vacation after January Term, 1914.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY CO.
vs.
EDWARD DETTELBACH.

Error to Common Pleas.

Aug. 28, 1913.—Petition in error Waiver of process Transcript and original papers from Common Pleas filed.

Oct. 16, 1913.—Motion by Pl'ff in error for extension of time to file Brief filed.

Oct. 15, 1913.—To Court: The motion by the plaintiff in error for an extension of time in which to file a brief, is heard and granted.

Jour. 1, Pg. 165.

Oct. 29, 1913—Brief by Pl'ff in error with two copies filed.

Oct. 30, 1913.—Proof of Service Filed.

Nov. 8, 1913.—Motion by Pl'ff in error for leave to Amend Petition in error filed.

Nov. 11, 1913.—Brief by Def't in error with two copies and proof of service filed.

Nov. 22, 1913.—To Court: The motion by the plaintiff in error for leave to amend its petition, is heard and granted.

Jour. 1, Pg. 185.

Feb. 9, 1914.—To Court: This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel: and on consideration of all the assigned errors, the Court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error
96 recover of said plaintiff in error his costs herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution.

To all of which the plaintiff in error excepts.

Jour. 1, Pg. 251.

March 3, 1914.—Precipe filed and transcript of Docket and Journal Entries to Supreme Court issued.

May 27, 1914.—To Court: And thereupon on the 27th day of May, A. D. 1914, there was duly filed with the Clerk of this Court a certain Certificate of Journal Entry in this cause, which is in the words and figures following, to wit: "State of Ohio, City of Columbus, #14557, Supreme Court of the State of Ohio, of the Term of January, A. D. 1914. Tuesday May 19th. The C. C. C. & St. L. Ry. Co. vs. Edward Dettlebach, 8387. Motion for an order directing the Court of Appeals of Cuyahoga County, to certify its record. It is ordered by the court that this motion be, and the same hereby is, overruled. I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to wit: from Journal No. 27 page 472. In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 26th day of May, A. D. 1914. Frank E. McKean, Clerk. By Seba H. Miller, Deputy. (Seal.) "Attest Edmund B. Haserodt," Clerk. By R. E. Mollenkopf, Deputy.

Jour. 1, Pg. 351.

June 26, 1914.—To Court: And thereupon on the 26th day of June, A. D. 1914, there was duly filed with the clerk of this Court a certain Certificate of Journal Entry, in this cause, from the Supreme Court of the State of Ohio, which is as follows, to wit: "State of Ohio, City of Columbus, Supreme Court of the State of Ohio, #14586 of the Term of January, A. D. 1914 to wit: Tuesday June 16th. The C. C. C. & St. L. R'y Co. vs. Edward Dettelbach, 8456. Motion by defendant to dismiss petition in error in

cause No. 14586, on the General Docket. It is ordered by the Court that this motion be, and the same hereby is, sustained. It
97 is further ordered that defendant in error recover from plaintiff in error his costs herein expended, taxed at $—. I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said court, to wit: from Journal No. 26, page 501. In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 23rd day of June, A. D. 1914. Frank E. McKean, Clerk. By Seba H. Miller, Deputy. (Seal.) Attest Edmund B. Haseredt, Clerk. By R. E. Mollenkopf, Deputy.

Jour. 1, Pg. 380.

Aug. 12, 1914.—Certificate from the Supreme Court of Copy of application for order to Court of Appeals to certify its record filed.

Aug. 12, 1914.—Certificate from Supreme Court of Copy of Petition in error & motion to Dismiss same filed.

Aug. 12, 1914.—Writ of Error from Supreme Court of United States filed.

Aug. 12, 1914.—Bond filed.

98 In the Supreme Court of Ohio.

No. 14557.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,

vs.

EDWARD DETTELBACH, Defendant in Error.

Application for Order to Court of Appeals to Certify its Record to Supreme Court.

Comes now the plaintiff in error, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and moves the Court for an order directed to the Court of Appeals of Cuyahoga County, Ohio, directing said Court of Appeals to certify to this Court its record in the cause heretofore pending in said Court, in which this plaintiff in error was plaintiff in error, and defendant in error was defendant in error.

Plaintiff in error in support of said application shows the Court by copies of the record in said cause filed herewith:

(*a*). That said cause is one involving questions arising under the Constitution of the United States, and particularly Article 1, Section 10 thereof, and questions arising under the Constitution of the State of Ohio, and particularly Article II, Section 28, and said cause also involves questions arising under the Act of Congress of the United States, to regulate commerce, passed February 4, 1887, and the various amendments thereof, commonly known as

The Interstate Commerce Act, and also questions arising under the Statutes of the State of Ohio, concerning discriminations by railway companies.

(*b*). That said cause is one of public and great interest in that it involves an interpretation of the contract between a shipper and a railway company, providing for the transportation of property in which contract the parties agree upon a valuation of the goods, for all services to be performed under such contract, as to whether or not such contract is binding upon the shipper
99 so that no recovery can be had beyond such agreed value in the event of loss or damage to the goods while being held by the Railway Company in its warehouse, pending delivery.

(*c*). Plaintiff in error further shows the Court that error has probably intervened in said cause in said Court of Appeals by the decision of said Court, affirming the judgment of the Court of Common Pleas, and holding that the agreed valuation in the contract between the parties, covering the property in question, is not binding upon the shipper after the property has reached destination and is being held by the carrier as warehouseman pending delivery, and that the shipper may recover of the carrier in excess of such valuation under such circumstances, notwithstanding the contract by its terms covers every service to be performed by the carrier thereunder, until delivery of the property.

COOK, McGOWAN & FOOTE,
Attorneys for Plaintiff in Error.

Notice.

The defendant, in error, Edward Dettelbach, acknowledges receipt of a copy of the foregoing Motion and Notice, and that the same will be heard in said Court on the 26th day of March A. D. 1914, or as soon thereafter as the Court will hear the same; also a copy of the record from the Court of Appeals filed in the Supreme Court on this application.

EDWARD DETTELBACH,
By CARPENTER, YOUNG & STOCKER,
His Attorneys.

Dated March 13th, 1914.

Supreme Court of Ohio.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing printed copy of Application for order to Court of Appeals to certify its record to Supreme Court, is a true and correct copy of the original Application (or Motion) for an order to the Court of Appeals of Cuyahoga County to certify its record to the Supreme Court of Ohio, filed in Cause No. 14557 in this court on March 26th, 1914.

100 In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, this tenth day of August A. D. 1914.

FRANK E. McKEAN,
Clerk of Supreme Court of Ohio,
By SEBA H. MILLER,
Deputy.

[Seal of the State of Ohio.]

Filed Aug. 12-1914. Edmund B. Haserodt, Clerk.

101 In the Supreme Court of Ohio.

No. 14586.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY
vs.
EDWARD DETTELBACH.

Petition in Error.

Filed Apr. 16-1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

Plaintiff in Error says that at the January Term, A. D. 1914 of the Court of Appeals in and for Cuyahoga County Ohio, the defendant in error recovered a judgment against plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff in error and defendant in error was defendant in error.

A transcript of the docket and journal entries whereof and of all the original papers are filed herewith.

Plaintiff in error says there is error in said record and proceedings in the following, to wit:

1. Said Court of Appeals erred in affirming the judgment of the Court of Common Pleas.

2. Said Court of Appeals erred in not reversing the judgment of the Court of Common Pleas.

3. Said decision and judgment of said Court of Appeals was contrary to law.

4. Said decision and judgment of said Court of Appeals is in violation of the constitution of the United States, and particularly Article 1, Section 10 thereof, by impairing the contract rights of plaintiff in error; and is also for the same reason in violation of the constitution of the State of Ohio, and particularly Article II, Section 28th thereof.

5. Said decision and judgment of said Court of Appeals is in violation of the act of Congress, entitled "An act to regulate commerce" passed February 4, 1887, and the various amendments thereto, commonly known as "The Interstate Commerce Act."

There are other errors apparent on the record.

Wherefore plaintiff in error prays that said judgment of
102 the Court of Appeals and of the Court of Common Pleas may each be reversed, and that it may be restored to all things it *had* lost by reason thereof.

COOK, McGOWAN & FOOTE.
Attorneys for Plaintiff in Error.

Waiver of Summons in Error.

comes now the defendant in error and waives the issuance and service of summons herein and hereby enters his appearance in the above entitled action, without waiving objection to jurisdiction.

CARPENTER, YOUNG & STOCKER,
Attorneys for Defendant in Error.

STATAE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing is a true and correct copy of the original petition in error in cause No. 14586, filed in said Supreme Court of Ohio on April 16, 1914.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 10th day of August, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

103 In the Supreme Court of the State of Ohio.

#14586.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error.
vs.
EDWARD DETTELBACH, Defendant in Error.

Motion to Dismiss Petition in Error

Now comes the Defendant in Error, and moves the Court to dismiss the Petition in Error herein for the following reasons;

1. The case below was one in which, by virtue of the provisions of Article 4, Section 6 of the Constitution of Ohio, the judgment of the Court of Appeals, affirming that of the Court of Common Pleas, was final, and the filing of such Petition in Error here was unauthorized, and this Court is without jurisdiction to review the proceedings of the Court below.

2. In case No. 14557, in this Court, Plaintiff in Errror filed its application for an order, directing the Court of Appeals, of Cuyahoga County, to certify its record in said cause, averring that the case was one involving questions arising under the Constitution of the United States, and of the State of Ohio, and was one of public or great general interest in which the lower courts had erred, and such application was submitted to this Court upon the same record which is filed herein, and upon briefs of the parties, and on May 19th-1914, was overruled.

CARPENTER, YOUNG & STOCKER,
Attorneys for Defendant in Error.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing is a true and correct copy of the Motion to dismiss petition in error filed in Cause No. 14586 in this Court on June 8, 1914.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court this 10th day of August, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

Filed Aug. 12-1914. Edmund B. Haserodt, Clerk.

104 STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals Eighth District, January Term, 1914.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error.

vs.

EDWARD DETTLEBACH, Defendant in Error.

Opinion Rendered February 9, 1914.

Error to Court of Common Pleas.

Winch, Meals and Grant, JJ.

GRANT, *J.:*

This is a proceeding in error, the purpose of which is to obtain the reversal of a judgment of the Court of Common Pleas.

The parties here stand in the contrary order of their standing in the lower court, but for convenience they will be designated as they were there.

The petition below alleged for substance that on the 1st day of

November, 1911, the plaintiff was the owner of certain specified goods, to the value of $2,792.00, which were then in the possession of the defendant—being a corporation—, in its warehouse in Cleveland, and which goods the defendant was at the time bound safely to keep and deliver to the plaintiff. Such obligation, it was charged, arose from the facts that the goods in question had been shipped in three boxes, from Denver, Colorado, over the Chicago, Burlington and Quincy Railway, consigned and directed to the wife of the plaintiff at Cleveland; that by the last mentioned railway company and its connecting carriers, in consideration of the freightage money duly paid, the goods were delivered to the defendant company and by it brought to Cleveland, in good condition; that upon their arrival in Cleveland the defendant failed to give the plaintiff, or his wife, the consignee, immediate notice thereof, but kept
105 the consignment in its possession as warehouseman for a considerable time after its function of carriage had ended; that on the 1st of November, 1911, the goods were stolen from the warehouse of the defendant, on account of its negligence in failing safely to keep and protect them while thus in its possession, without fault on the part of the plaintiff, and that the latter had thus and thereby suffered damage in that respect in the sum of $2,792.00, for which judgment was asked.

The petition further averred that the plaintiff duly presented a written statement of his claim, to the defendant, for allowance, which was refused.

The answer admitted the corporate existence of the defendant; that its business was that of a common carrier of freight, for hire; that at or about the date mentioned in the petition certain goods were shipped from Denver over the Chicago, Burlington and Quincy Railway; that these were brought to Cleveland, and that the consignee having failed, upon notice given, to remove them, they remained in the possession of the defendant as warehouseman. All else was denied, generally.

A further and special defense in the answer alleged that the goods in question were received at Denver for shipment pursuant to a bill of lading issued by the receiving carrier, and subject to the conditions, stipulations, tariffs and classifications evidenced by its terms and then in force, to which the shipper, agent of the plaintiff, consented and agreed; and that the agent—having that choice—elected to ship the goods at a rate of freightage below the regular and normal rate chargeable for that class of property, on account of which reduction in rate the agent then declared his valuation of the property as being $10.00 for each one hundred pounds and agreed that this should be the limit of liability resting upon the carrier in any event in case of loss or damage for which the latter might become liable.

It was further pleaded that the Statute of the United States, commonly called the Interstate Commerce law, forbade the payment by the defendant, in such a case, of more than at the rate of valuation thus limited and agreed upon.

The plaintiff, in a Reply, admitted that the goods were
106 shipped upon a bill of lading containing the limitation, substantially as set forth in the answer.

Upon these issues the cause was tried to a jury. There was a verdict for the plaintiff, upon which the judgment sought to be reversed here was entered, after a motion for a new trial had been overruled.

The brief for the complaining party alleges two questions as arising upon this record. In the language of the brief, these two questions are thus stated: "First, whether there was any evidence in the record tending to show that defendant was guilty of any negligence while acting as such warehouseman; and secondly, whether the clause in the bill of lading by which the value of the goods was declared to not exceed $10.00 per hundredweight did not limit plaintiff to a recovery on such basis, even though defendant might be found guilty of negligence in the theft of the box."

The first of these two questions must be resolved against the contention of the defendant company. It is not conceded, as the brief states and the argument assumes, that the goods were stolen from the company; the concession is less than that and is to the effect that the obligation of the warehouseman was to keep the property in safety, which obligation it failed to observe, and that by its negligence in that respect the goods were lost. The subsequent averment that the company negligently allowed the goods to be stolen did not change the legal effect of the delinquency charged. The answer denied the allegation—such as it was—, and the plaintiff offered no evidence on that point, except that the witness, Andrews, expressed a suspicion that the goods were stolen from the company's warehouse, in the daytime, by a black man; the proof went no further than this. It was not material to any issue in the case. The court properly submitted the issue of the company's negligence to the jury, under a charge that was unexceptionable in that respect. We are of the opinion that the evidence upon that issue supports the verdict and the consequent judgment complained of.

The other contention presents greater difficulties and
107 to resolve them satisfactorily is by no means easy. Whatever may be thought of the right of a common carrier to limit its liability in case of a loss, arbitrarily, as a matter of principle and the bearing that public policy has upon it, the question here is relieved by the fact that the shipper by consenting to the limitation got a consideration in the shape of a rate of $2.37½ per hundred, instead of $3.563, which without the contract of release he would have had to pay. For the purposes of this case this reduction, this advantage, may be said to support the agreement to limit the company's liability. The difficulty at this point resides in determining where the contract of release ends, and whether it can be extended from the relation of the shipper to the company as a carrier to the company as warehouseman. For the company is sued here in the latter capacity and not the former. And in its answer the company admits that held the goods when it last

possessed them as warehouseman and not as carrier. To occupy this twofold relation is of advantage to the company. As soon as the company can occupy it by replacing with it its former relation as a common carrier, it obtains the benefit of the rule of ordinary care instead of the higher degree of vigilance which the law charges upon carriers for hire. And the company is further advantaged by an early shifting of its status as carrier to that of warehouseman, through its right in the latter capacity to charge for the storage of consigned goods, from the time when its relation to them as carrier ceases. Section 5 on the back of the bill of lading in this case provides very fully and clearly for the ending of the relation of the company as carrier and for at once entering into the other and at times more favorable relation of warehouseman. It stipulates that if consigned property is not removed by the consignee within forty-eight hours after the sending of notice to him, it may be kept by the company subject to charges for storage and liability as warehouseman only. The language of the contract of limitation in this case, stamped on the face of the bill of lading and signed by the plaintiff's agent, is as follows:

108 "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10. per cwt."

In this there is no hint or suggestion that this declaration shall inure to the advantage of a warehouseman after it should become inert for the relief of the carrier. The fact that here the defendant company warehouseman was, before its duties as warehouseman arose, the carrier of the warehoused goods and that the name of the carrier company was the same as that of the warehousing company, is of no significance whatever; the coincidence of name is a mere accident. In contemplation of law the two are separate beings —entirely so. When the goods were shipped the defendant company as warehouseman could not have been in the mind of the shipper at all. The undertaking of the C. B. and Q. Railway Company was to carry the goods as far on their route to destination as its own lines extended and then to deliver them to a connecting carrier. What company that other carrier should be was of course unknown to the consignor, and still less must have been his knowledge of who his warehouseman was to be, or that he was to have any warehouseman.

Hutchinson on Carriers, Section 714, 3rd Edition, reflects this consideration of the separable relations, advantages and obligations of the double function residing in the two entities, as follows:

"But so soon as it (that is, the time modified for removal) has elapsed he no longer stands in the relation of carrier to the goods, but as that of an ordinary bailee for hire. Though an involuntary, he is not a gratuitous bailee. He has the right to charge for the storage and keeping of the goods as warehouseman for whatever length of time they may remain in his custody after the reasonable opportunity has been afforded to the owner to remove them, in addition to his compensation for their carriage. The custody and protection of the goods as warehouseman, is a distinct service from

that of their transportation, which entitles him to additional compensation in consideration for which he continues liable for their safe keeping as the hired bailee of the owner."

109 The "additional compensation" is not at all diminished in this case because of the agreement of limitation of liability. The reduction in the rate of carriage which can be used as a consideration to support that agreement, is no consideration for a like limitation of the liability as warehouseman, because there is no reduction in warehousing charges provided or stipulated for in the transaction. It is not easy to see why the consideration—not a large one—which is permitted to support the agreement to a limited liability on the part of the carrier, should do double duty by serving also to uphold a like limitation of the liability of a warehouseman,—the latter not agreeing to abate any part of proper storage charges. To so extend the contract of release would give an advantage to the warehouseman, but none to the owner. To allow that consideration would be to permit the carrier to cast off his obligation as carrier and take up a lighter burden, while he denies to the shipper all right to share in the benefit of the changed relation. The rate which the warehouseman may charge for storage remains unaffected by the release of liability as a carrier. The warehouseman could collect the reasonable value of his service whether the limitation of the carrier's liability was or was not stipulated. He could not be compelled to take less because of the stipulation. He could collect no more if the stipulation had not been made.

See Carrus vs. Robins, 8 M. and W., 258; Schumacher vs. Ry. Co. 207 Ill., 199, affirming 108 Ill. App., 520.

It is indeed said in the brief for the plaintiff in error that "The duty of the carrier under the contract was not ended until it had delivered the property." But earlier in the brief it is strenuously contended that the changed relation of bailor and bailee should obtain and be operative in considering the question of whether the goods were stolen or not. An inspection of Section 5 on the back of the bill of lading will show that the prime object and purpose of its provisions was to substitute the one relation for the other at the earliest moment when the change could be made,—that is, as soon as the shipment should reach its destination and notice

110 of its arrival be given. Of course, the party thus at liberty to act either as carrier or as warehouseman saw an advantage in providing for the change. The advantage lay in the lessened liability in case of loss if the relation were fixed as that of bailor and bailee. A party should not be allowed thus to shift positions and maintain one while it seems advantageous to itself to do so, and then repudiate it when no longer profitable to itself. And a contention which tends to justify such a practice should be scanned narrowly before it is permitted to have a controlling force. Stipulations limiting the liabilities of carriers are upheld because they soften the rigor of the common-law, which did not allow them. But courts have been careful in seeing to it that they are not permitted

to degenerate from wholesome doctrine to mere pitfalls in which the unwary are to be caught.

In Wheeler vs. The Oceanic Steam Navigation Co., 125 N. Y., 155—at page 161, it is said: "These cases show that the liability for negligence as bailee survives even when by special contract the carrier has thrown off his liability as such; and the courts of this state have exhibited a very decided purpose to retain and enforce that liability wherever it is possible. Even that may be thrown off by force of special agreement, but we have refused to permit any general words to accomplish such result, and have insisted that where the carr-er seeks to contract against the consequences of his own negligence, he must say so openly and plainly, so as not to be in the slightest degree misunderstood, and is not at liberty to hide the stipulation away under any form of words, however broad or formidable."

In Wells vs. Steam Navigation Co., 8 N. Y., 375, Judge Gardner says: "We held then, if a party vested with a temporary control of another's property, for a special purpose of this sort, would shield himself from a responsibility on account of the gross negligence of himself or his servants, he must show his immunity on the face of his agreement, and that a stipulation so extraordinary, so contrary to general usage and the understanding of men of business, would not be implied from a general expression, 111 to which effect might otherwise be given."

In Alexander vs. Green, 7 Hill, 533, the court said:

"To maintain a proposition (to limit a liability) so extravagant as this would appear to be, the stipulations of the parties ought to be most clear and explicit, showing that they comprehend in their arrangement the case that actually occurred."

In Mynard vs. The Syracuse, Binghamton and N. Y. R. R. Co., 71 N. Y., 180, this language appears: "The carrier should not be released from the consequences of his own wrongful acts, under general words or by implication."

In Nichols, et al., vs. N. Y. C. & H. R. R. R. Co., 89 N. Y., 374, it is said: "The circumstances under which contracts of this kind are usually made, preclude a careful consideration by the shipper of their language and effect, and it is not too much to require that the carrier, who usually prepares the contracts in advance and exacts the consent of the shipper as a condition of taking his property, shall, in explicit language, if he seeks to rid himself of the obligation of care, and free himself from responsibility for his own negligence, express this intention in his contract, and that it shall not be left to inference, argument or construction from general language."

These observations seem to apply with force to Section 5 on the back of the bill of lading in the case at bar, under cover of which there is now sought to be imported an extension of the agreement of release stamped on the face of the bill, from the obligation of the defendant qua carrier to that of the defendant qua warehouseman. For the language of Section 5, although not obscure, is in very general terms and would not challenge the attention of a

shipper to the probability of such a construction as is now claimed for it. It contains no express provision for such an extension, nor, so far as we can see, a suggestion of it.

So far we have discussed this question as a matter of principle, in the light of such authority as is cast upon it collaterally as to the involved principle.

112 Approaching it along the line of other adjudications directly in point, we have considered the case of Union Pacific Railway Co. vs. Moyer, 40 Kan., 184. In that case goods were shipped from Ohio, over the Toledo and Ohio Central road and connecting lines to a point in Kansas. The last connecting carrier was the Union Pacific Company, the plaintiff in error in the case. The other facts necessary to an understanding of the question decided are in the second syllabus, which is as follows:

"Where on the shipment of goods a receipt is given to the shipper therefor, on the back of which is printed a contract limiting the liability of the carrier in the transportation of the goods, and the liability as common carrier on the safe arrival of the goods at their destination, and afterwards the goods are permitted to remain at their destination until such carrier becomes liable only as warehouseman, and afterwards the goods are destroyed by fire, held, in an action by the owner to recover their value the receipt and contract are immaterial, and their exclusion as evidence is not error."

In that case the question was disposed of by the rejection of the contract of release when it was offered as evidence. In the case at bar it was raised directly, after the evidence was in, by a motion for a directed verdict for the defense, and also by the first request to instruct before argument, both of which were refused. Assuming that there was a consideration to support the contract of release in the last mentioned case and the parity of facts between the two cases seems to be complete, and we can see nothing but a coincidence of principle in them. If this is true, we can well apply the Kansas case to the one in hand as an authority having a somewhat compelling force in the conclusion to be reached. In allowing the Kansas case—and no countervailing case which seems to be in point has been brought to our attention—to have a rather coercive force over our judgment, it only furnishes support to support the conclusion towards which our discussion of the question as matter of principle, unaided by authority, had evidently been tending.

Upon a painstaking examination of the whole case, we are unable to find in the record any error of substance to the harm of the complaining party, or to say that substantial justice has not been done to it in the proceedings under review.

113 The judgment complained of is affirmed.

Messrs. Cook, McGowan & Foote, Counsel for Plaintiff in Error.

Messrs. Carpenter, Young & Stocker, Counsel for Defendant in Error.

114 *Authentication of Record.*

STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals, Eighth District.

I, Edmund B. Haserodt, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 113, inclusive, are a true, full and complete transcript of the record and proceedings in the case of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error, against Edward Dettlebach, defendant in error, and also of the opinion of the Court rendered therein, as the same now appears on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Cleveland, Ohio, this Aug. 18th, 1914.

[Seal Court of Appeals, Cuyahoga County, Ohio.]

EDMUND B. HASERODT,
Clerk, Court of Appeals, State of Ohio, Eighth District.

115 In the Supreme Court of the United States.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
EDWARD DETTLEBACH, Defendant in Error.

Petition for Writ of Error, Assignment of Errors, and Prayer for Reversal.

To the Honorable Edward D. White, Chief Justice of the United States, and to the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, and to the other Justices in said Honorable Court, and to the Honorable the Supreme Court of the United States:

Considering itself aggrieved by the final decision of the Court of Appeals of the Eighth District of the State of Ohio, in rendering judgment against it in the above entitled action, plaintiff in error hereby prays a writ of error from said decision and judgment and for an order fixing the amount of a supersedeas bond.

Plaintiff in error says that there are errors in the records and proceedings of said cause and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment of errors:

The defendant in error sued in the Court of Common Pleas of Cuyahoga County, Ohio, to recover of plaintiff in error the sum of Twenty-seven Hundred and 92/100 Dollars ($2792.00), being the

claimed value of certain articles which had been shipped from Denver, Colorado, to Cleveland, Ohio, and which it is claimed were stolen from the depot of plaintiff in error in the City of Cleveland Ohio, while being held by it in its capacity as warehouseman.

116 Plaintiff in error set up as one of its defenses that the articles in question were shipped from Denver, Colorado, under a certain contract or bill of lading between defendant in error and The Chicago, Burlington & Quincy Railroad Company; that said contract, among other things, contained the following provisions:

"It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns." * * *

"I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per cwt." * * *

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charged, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." * * *

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

Plaintiff in error received the articles in question as a connecting carrier of The Chicago, Burlington & Quincy Railroad Company, and all services performed by it with respect to said property were under the terms of said contract.

Plaintiff in error contended in said defense that defendant in error had voluntarily entered into said contract and declared said value of Ten Dollars ($10.00) per cwt. for the purpose of securing the services provided for thereunder at a reduced rate of freight based upon said valuation as provided in the tariffs and classifica-

117 tions then in force and duly published and filed with the Interstate Commerce Commission at the City of Washington, D. C., pursuant to the provisions of the Act of Congress en-

titled "An Act to Regulate Commerce" passed February 4, 1887, and of the various amendments thereto; that having declared such valuation and secured such reduced freight rate defendant in error was precluded by the provisions of said statutes of the United States from receiving or recovering any sum of plaintiff in error in excess of the value thus declared for any goods claimed to have been stolen and that to permit a recovery in excess of said valuation would be in direct contravention of the provisions of said statutes.

The tariffs and classifications in force at the time of the making of said contract and covering such shipments were offered in evidence in the trial court and shown to have been duly published and filed in accordance with said statutes.

This plaintiff in error at the conclusion of the testimony requested the trial court to charge the jury as follows:

"Even if the jury find for plaintiff in this case the amount of such verdict shall not exceed the sum of Ten Dollars ($10.00) per hundred weight of the goods claimed by plaintiff to have been lost and included in the shipment covered by the bill of lading in evidence in this case.

"In no event can the jury in this case find for plaintiff in a greater sum than $10.00 for each one hundred pounds of the weight of the goods shipped by plaintiff under the bill of lading, "Plaintiff's Exhibit 1," from Denver, Colorado, to Cleveland, Ohio, part of which are claimed by Plaintiff *yo* have been lost."

These requests were refused and such refusal properly excepted to and thereafter the Court charged the jury as follows:

"The second defense is a statement of certain matters in the bill of lading and certain matters of law with reference to the value of the goods and the result of the second defense as pleaded is to the effect that if the plaintiff would be entitled to recover in this action at all, he would be only entitled to recover the value of $10.00 per one hundred weight of these goods; that defense the Court has already disposed of in your presence, I think, by simply holding that the measure of damage would be other than that stated, which I will undertake to state to you later." * * *

"Now, if you find for the plaintiff under these instructions and under the evidence in the case, then I say to you that the
118 plaintiff will be entitled to recover the fair market value of such goods, with interest from the time they should have been delivered to plaintiff; plaintiff states in his petition that was the 1st of November, 1911; I will leave that stand as the date; there is some little controversy here, 6th of November, I think he was there and didn't get the goods. So that as I have said, if you find for the plaintiff, you will ascertain from the testimony in the case the fair market value of the goods that were lost or not recovered by him from the company and allow interest on it from the 1st of November, 1911, up to the first day of this term of court, which was the 2nd day of April, 1913."

Under these instructions the jury returned a verdict in favor of defendant in error in the sum of Three Thousand Twenty-nine and 32/100 Dollars ($3029.32), notwithstanding the evidence

showed that the weight of the articles lost did not exceed three hundred and fifty (350) pounds.

The Court of Appeals of Cuyahoga County, to which the case was carried on error, affirmed the judgment of the Court of Common Pleas, holding that defendant in error could not be limited in recovery to the value of the articles as declared in the contract since the articles were not lost in the course of transportation, but while held by plaintiff in error in its capacity as warehouseman, and that the valuation thus declared did not include the services to be performed by plaintiff in error as warehouseman.

The Supreme Court of the State of Ohio overruled an application to it by plaintiff in error for a writ of error from that Court for a review of said judgment and decision of said Court of Appeals and the Supreme Court also dismissed for want of jurisdiction a petition in error filed in that Court by this plaintiff in error for a review of said decision and judgment.

The Court of Appeals of the Eighth District of Ohio being the highest court in the State to which said case could be carried, has by its judgment in affirming the judgment of the Court of Common Pleas and refusing to reverse the judgment of said Court of Common Pleas for the errors committed by that Court in refusing to give the instructions hereinbefore set forth, as asked by plaintiff in error at the conclusion of the testimony, and in charging the jury as hereinbefore set forth, denied to plaintiff in error the right,
privilege and immunity specially set up and claimed by it
119 under said statutes of the United States, by permitting in
contravention of said statutes a recovery by defendant in error of a sum in excess of Ten Dollars ($10.00) per cwt., the valuation declared in said contract.

For which errors the plaintiff in error, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, prays that the said judgment of the Court of Appeals of the State of Ohio for the Eighth District thereof, dated February 9, 1914, be reversed and that your petitioner in error may have such other and further relief in the premises as may be just and for costs.

FRANK L. LITTLETON,
EDWARD A. FOOTE,
Attorneys for The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

The Supreme Court of the United States.

Let the writ of error issue upon the execution of a bond by The Cleveland, Cincinnati, Chicago & St. Louis Railway Company to Edward Dettlebach in the sum of Six Thousand Five Hundred ($6,500.00) Dollars; such bond when approved to act as a supersedeas.

Aug. 6, 1914.

WILLIAM R. DAY,
Associate Justice Supreme Court of United States.

[Endorsed] In the Supreme Court of the United States. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error, vs. Edward Dettlebach, defendant in error. Petition for writ of error; assignment of errors, and prayer for reversal. Frank L. Littleton, Edward A. Foote, Attorneys for Plaintiff in Error.

120 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the State of Ohio for the Eighth District, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error, and Edward Dettlebach, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said the Supreme Court at Washington, within thirty days from the date hereof

121 that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, the 8th day of August, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of the District Court Northern District of Ohio.]

B. C. MILLER,
Clerk District Court of the United States
for the Northern District of Ohio.

Allowed Aug. 6. 1914.

WILLIAM R. DAY,
Associate Justice Supreme Court of the United States.

[Endorsed:] In the United States Supreme Court. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error, vs. Edward Dettlebach, Defendant in Error. Writ of Error. Filed Aug. 12, 1914. Edmond B. Haserodt, Clerk. Frank L. Littleton, Edward A. Foote, Attorneys for plaintiff in error.

122 In the Supreme Court of the United States.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
EDWARD DETTLEBACH, Defendant in Error.

Bond.

Know all men by these Presents, That we, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, as principal, and The National Surety Company as surety, are held and firmly bound unto Edward Dettlebach, of the City of Cleveland, Ohio, in the sum of Sixty-five Hundred ($6500.00) Dollars, to be paid to the said Edward Dettlebach, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 23rd day of July, 1914.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of Ohio for the eighth District.

Now, Therefore, The condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

THE CLEVELAND, CINCINNATI, CHGO & ST. LOUIS RAILWAY CO.,
By H. A. WORCESTER, *General Manager.*
NATIONAL SURETY COMPANY,
By S. M. FERRIS, *Attorney in Fact.*

Bond approved and to operate as a supersedeas. Dated August 6, 1914.

WILLIAM R. DAY,
Associate Justice, Supreme Court of the United States.

123 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edward Dettlebach, Cleveland, Ohio, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Appeals of the State of Ohio, for the Eighth District thereof, wherein The Cleveland, Cincinnati, Chicago & St. Louis Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 6 day of August, in the year of our Lord one thousand nine hundred and fourteen.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

CLEVELAND, OHIO, August 12th, 1914.

I, Attorney- of Record for the Defendant in Error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

CARPENTER, YOUNG, STOCKER & FENNER,
Attorney- for Edward Dettlebach.
C. C. YOUNG.

[Endorsed:] In the Supreme Court of the U. S. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error, vs. Edward Dettlebach, Defendant in Error. Citation and Return of Service. Frank L. Littleton, Edward A. Foote, Attorneys for Plaintiff in Error.

124 *Certificate of Lodgment.*

STATE OF OHIO,
Cuyahoga, County, ss:

In the Court of Appeals, Eighth District.

I, Edmund B. Haserodt, Clerk of said Court, hereby certify that there was lodged with me as such clerk on Aug. 12th, 1914, in the matter of The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error, against Edward Dettlebach, defendant in error;—

1. The original bond, of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth,—one for defendant, and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Cleveland, Ohio, this 18th day of Aug. 1914.

[Seal Court of Appeals, Cuyahoga County, Ohio.]

EDMUND B. HASERODT,
Clerk Court of Appeals, State of Ohio, Eighth District.

125 STATE OF OHIO,
Cuyahoga County, ss:

In the Court of Appeals, Eighth District.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
EDWARD DETTLEBACH, Defendant in Error.

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Court in the City of Cleveland, Ohio, this 18th day of Aug. 1914.

[Seal Court of Appeals, Cuyahoga County, Ohio.]

EDMUND B. HASERODT,
Clerk Court of Appeals, State of Ohio, Eighth District.

Edward Dettlebach's costs	$32.06
C. C. C. & St. L. Ry. Co.'s costs	20.06
Cost of Transcript	39.95

EDMUND B. HASERODT.

Endorsed on cover: File No. 24,347. Ohio Court of Appeals, Eighth District. Term No. 603. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, vs. Edward Dettlebach. Filed August 21, 1914. File No. 24,347.

No. 603. 229

In the Supreme Court of the United States

October Term, 1914.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR, OR TO AFFIRM JUDGMENT, AND BRIEF IN SUPPORT.

JESSE A. FENNER,
Attorney of Record for
Defendant in Error.

C. C. YOUNG,
CHAS. L. STOCKER,
Of Counsel.

No. 603.

In the Supreme Court of the United States

October Term, 1914.

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
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JESSE A. FENNER,
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C. C. YOUNG,
CHAS. L. STOCKER,
Of Counsel.

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Texts and Cases Cited in Brief.

No. 603.

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———o———

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Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

———o———

MOTION TO DISMISS WRIT OF ERROR, OR TO AFFIRM JUDGMENT.

Now comes Edward Dettelbach, defendant in error, and moves this Honorable Court:

1. To dismiss the writ of error herein, for the reason that in the proceedings in the State Court of Ohio, the validity of no treaty or statute of the United States, or authority exercised thereunder, and the validity of no statute of any state or authority claimed thereunder, were drawn in question, and the decision of the State Court complained of here was not against any right, title, privilege or immunity set up or claimed by the plaintiff in error under the constitution, treaties or statutes of the United States, and in no other way, did any question arise in the proceedings in the State Court giving this Court jurisdiction thereof.

2. To affirm the judgment and decision of the Court of Appeals of the State of Ohio for the reason that such judgment was manifestly correct, and this writ of error was taken for delay only, and the questions upon which the decision of this cause depend are of such frivolous character as not to require further argument.

JESSE A. FENNER,
Attorney of Record for Edward Dettelbach, Defendant in Error.

C. C. YOUNG,
CHAS. L. STOCKER,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1914.

———o———

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

———o———

BRIEF IN SUPPORT OF MOTION TO DISMISS.

———o———

If the first request in the motion of defendant in error be granted the second will, of course, become immaterial.

That no federal question arose in the proceedings in the State Court will, as we believe, appear from a statement of the facts and proceedings in that court.

STATEMENT.

The defendant in error being the owner of certain Mexican and Indian blankets and rugs, and other materials, of a value exceeding Three Thousand ($3,000.00) Dollars, which were located at Denver, Colorado, caused them to be shipped on September 18th, 1911, from that city, over The Chicago, Burlington and Quincy Railway, and other lines, consigned to Mrs. Edward Dettelbach, the wife of the owner, at Cleveland, Ohio, being contained in three wooden boxes.

The goods reached destination in good order, and were unloaded by the plaintiff in error on September 27th, 1911, and not being promptly called for they remained in the possession of the railway company until November following, when, by reason of the carelessness and negligence of the agents of the railway company, the box containing articles of the greatest value was lost or stolen, and the other boxes broken into and a considerable part of the contents removed, the remainder being delivered to the owner.

Upon refusal of the railway company to make good his loss, the owner brought suit in the Common Pleas Court of Cuyahoga County, and as the result of a trial by jury recovered a verdict for Three Thousand, Twenty-nine and 32/100 ($3,209.32) Dollars, upon which judgment was duly rendered, and this judgment affirmed by the Court of Appeals of the Eighth District, and the Supreme Court of Ohio refused to review the proceedings of the lower courts.

In his petition in the Common Pleas Court the defendant in error, in connection with a statement of the facts relating to the shipment of the goods, their arrival at Cleveland and their non-delivery, alleged that they were so lost by the negligence of the railway company while in its possession as warehouseman.

Printed Record, page 2.

The company in its answer admitted

> "that said goods were transported to Cleveland, Ohio, and the consignee thereof having failed upon notice given to remove same, remained in the possession of the defendant as warehouseman."

Printed Record, page 6.

Upon this subject the evidence of the railway company disclosed that prior to the time of the loss of the goods they were so in its possession, in charge of one of its agents, named Andrews, known as the clerk in charge of over, short and damaged freight.

Printed Record, pages 44 and 51.

And the boxes were put to one side in the warehouse in an unusual place.

Printed Record, pages 55 and 61.

And the railway company and its agents treated the goods as being held at the owner's risk.

Exhibit 4, Printed Record, pages 77 and 78.

There was no conflicting evidence on this subject, the parties agreeing, both in their pleadings and evidence, that the goods were lost or stolen while so in the possession of the railway company in its capacity of warehouseman. It is true that in its answer the railway company pleaded a stipulation in the bill-of-lading issued by The Chicago, Burlington and Quincy Railway Company, relating to the value of the goods as having a bearing upon the freight rate for transporting the same from Denver to Cleveland, with the further allegation in the pleading that to permit recovery above such agreed valuation would be contrary to the statutes of the United States regulating commerce between the states.

Printed Record, pages 7 and 8.

But there was no holding by the courts of Ohio, or any of them, against the validity of such stipulation as to the value, or against the validity of such statutes, because they were not considered as having any bearing upon the case, and their validity was not in issue between parties.

NO FEDERAL QUESTION INVOLVED.

It appears therefore, upon the facts admitted, that the action was one in tort, or upon an implied contract between a bailor and bailee to recover for a loss which occurred in the State of Ohio while the goods were in storage, and that the action was controlled, and the rights and obligations of the parties fixed by the laws of Ohio, or rather by the application of well-known principles of common law applied by the Courts of Ohio to the issues in the case.

The action was not based upon the bill-of-lading. The owner had made no contract with plaintiff in error. He had a right to bring his action *ex delicto*, and did so.

3 Hutchinson on Carriers, Sections 1324 and 1359.

Van Zile, Bailments and Carriers, Section 690.

This may be made more clearly to appear by considering what would necessarily have resulted if the owner had brought suit against The Chicago, Burlington and Quincy Railway Company, relying upon the provision of the Carmack Amendment, 4 United States Compiled Statutes, 1913, Section 8592 (11), to the effect that the initial carrier issuing a bill-of-lading is liable for loss occurring by reason of the negligence of connecting carriers, and that therefore The Chicago, Burlington and Quincy Railway Company was liable for the loss of the goods by the negligence of the plaintiff in error. In such case it would have been a complete defense on the part of The Chicago, Burlington and Quincy Railway Company, to show that the goods were not on the line of the connecting carrier when lost, but that they were taken from its warehouse after the contract of carriage had been performed, and that therefore the provisions of the Carmack Act had

no application to such a case. For there was no loss or damage to the goods while on the line of the connecting carrier within the contemplation of that act.

It was so held by the Supreme Court of Virginia in a case where goods were shipped from Virginia to South Carolina, and after they were carried to destination by the second, or connecting carrier, not being removed by the consignee with a reasonable time, the goods were sold for freight charges by the connecting carrier, and thereupon the consignee sued the initial carrier for damages. It was the opinion of that court that by the failure of the consignee to remove the goods in a reasonable time the liability of the connecting road as carrier ceased, and it thereupon became liable only as warehouseman. And, although it was recognized that while the goods were in transit, the Interstate Commerce laws had application and control, yet such was not the case after the relation of carrier was changed to that of ordinary bailee, and therefore the initial carrier was held not liable.

Norfolk & Western Ry. Co. vs. Stuarts Draft Milling Co., 109 Va., 184.

Other cases below cited are to the same effect.

Again, if in the proceedings in the State Court of Ohio complained of here, an issue had arisen as to where the loss occurred, whether in transit or after the goods had reached destination and had been stored, and this question of fact had been determined in the State Court, finding that the goods were lost while in storage, this would have excluded the existence of a federal question, although if the goods had been lost in transit the action would have been one controlled by Federal Statutes. For a decision of a question of fact by a State Court, although

a Federal question, does or does not exist according to the way the question is decided, is not reviewable here.

Dower vs. Richards, 151 U. S., 658.
Lewis vs. Campau, 3 Wall., 106.

No such question of fact did arise because the company admitted that the goods were lost while it sustained the relation of warehouseman. And from this it appears that its plea of a right arising under the United States Statutes, referred to in its answer, was frivolous, because from the facts admitted it necessarily followed that the provisions of the contract relied upon, and the Interstate Commerce Act, had no application.

The judgment of the Court of Appeals of Ohio was based upon the liability of a warehouseman to exercise reasonable care of goods in storage. In an earlier case decided by one of the same courts while still known as Circuit Courts, a railway company was held liable as bailee for goods lost after they were placed upon its platform used in connection with making shipments, but before shipping directions had been given to it by the owner.

Fisher vs. Lake Shore & Michigan Southern Ry. Co., 17 O. C. C., 491.

Both of these cases, the one where liability as warehouseman was found to exist before shipment, and the other after shipment and transportation was over, rested upon independent or non-federal grounds which were adequate to sustain them, and in such cases this Court is without jurisdiction to review.

Holden Land Co. vs. Interstate Trading Co., 233 U. S., 536.

The allegation of plaintiff in error in its answer in the State Court, that a refusal to sustain its defense un-

der the bill-of-lading would be to impair the obligation of contracts, does not alone present a federal question. If it did, then in all contract cases where the amount involved is sufficient to give jurisdiction the parties would be entitled to a review in this Court.

St. Paul, etc., Ry. Co. vs. Todd County, 142 U. S., 282.

And for the same reason the mere fact that plaintiff in error claimed a defense based upon the Interstate Commerce act, did not bring that act into question if it in fact had no application to the transaction.

Kennard vs. Nebraska, 186 U. S., 304.

The question here presented is whether or not the goods of defendant in error were lost in Interstate Commerce. If they were, the first request in our motion should be denied. If they were not, this proceeding should be dismissed.

And we submit that the language of the Carmack Amendment precludes the construction that Congress intended to include thereby such a transaction as this. The section in question relates to carriers, railroads and transportation companies, and to losses occurring upon their lines.

The loss in question did not occur upon the line of any railway, or while the goods were in process of transportation.

And there is nothing in the act indicating any intention to change or enlarge the common law liability of carriers, except to make the initial carrier liable for the negligence of connecting carriers also.

The case of Adams Express Company vs. Croninger, 226 U. S., 491, is of great importance in interpreting this Amendment. And in the opinion in that case it is said on page 511:

"The statutory liability, aside from responsibility for the default of a connecting carrier in the **route,** is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States."

And in Atlantic Coast Line vs. Riverside Mills, 219 U. S., 186, it is said at page 200:

"This burdensome situation of the shipping public in reference to interstate shipments over **routes,** including separate **lines** of carriers, was the matter which Congress undertook to regulate."

In view of the provisions of the law itself and the interpretation of it so given by this Court, the Supreme Court of Kansas has recently held:

"It was not the purpose of the amendment to extend the carriers' common-law liability, except to provide that, until the transportation ended, the liability of the initial carrier should continue exactly the same as if it owned one line of railway from the point of shipment to the point of destination."

"Under the Carmack Amendment the initial carrier is only made liable for loss, injury or damage resulting from some default in its common-law duty as a common carrier, or some default of the same kind in a succeeding carrier. It does not make the initial carrier liable as a carrier for a loss or injury to goods occurring while held by the succeeding carrier as warehouseman."

Applying these principles it was held that the initial carrier was not liable for loss by fire to goods shipped in interstate commerce after they had passed over its lines and were held by a connecting carrier as warehouseman.

Milling Co. vs. Railroad Co., 91 Kansas, 783.

And such has been the opinion of the highest courts of several other states.

Louisville & Nashville R. R. Co. vs. Brewer, 183 Ala., 172.

Dealwyler & Co. vs. Oregon Railroad & Nav. Co., 176 Ill. App., 597.

Atchison, T. & S. F. Ry. Co. vs. Homewood, 39 Oklahoma Reports, 179.

109 Va., 184, supra.

And upon the authority both of this Court and many State Courts we conclude that plaintiff in error has no greater rights in this case than it would have had if the Carmack Amendment had not been enacted.

Recent decisions of this Court, although not based upon facts entirely analogous, appear to establish the construction herein contended for, and that the admission of plaintiff in error that the goods were lost while held by it in its capacity of warehouseman, precluded it from asserting any federal right.

New Orleans & Northwestern Rd. Co. vs. Nat'l Rice Milling Co., 234 U. S., 80.

Wabash Railroad Company vs. Hayes, 234 U. S., 86.

Congress has not yet legislated upon the subject of the liability of a warehouseman in such a case as this. And until it does state laws will control.

Missouri, Kansas & Texas Ry. Co. vs. Harris, 234 U. S., 412.

Adams Express Company vs. Croninger, 226 U. S., 491.

And we submit that the boundary line between interstate and intra-state transactions is much more clearly marked in this case than in many others in which it has been found here that federal questions have not existed or been presented.

II.

THE QUESTION PRESENTED BY THE PETITION IN ERROR IS FRIVOLOUS.

But, if it shall be considered that jurisdiction exists to review the proceedings of the State Court, we submit that the record of such proceedings presents no error, but on the contrary clearly shows that the judgment of the State Court was correct.

The question was merely one of the application of the provisions of a contract to the facts involved, the validity of such contract when applied to matters within its scope not being questioned.

The only matter for determination was whether or not the stipulation in the bill-of-lading relating to the value of the goods shipped, applied after they had reached the destination at Cleveland, Ohio, and were held by the Railway Company as warehouseman.

The view of the State Court upon this question appears in the carefully considered and able opinion of Judge **Grant.**

Printed Record, page 86.

The rule of law is that after freight has reached the destination and consignee has had a reasonable opportunity to receive it, the Railway Company no longer stands in the relation of carrier to the goods. It becomes an ordinary bailee for hire with the right to charge storage for whatever time the goods remain in its possession. This is a distinct service from the carriage of the goods. The basis of liability of the Company is different, and the basis of compensation is also different from that controlling during the transit.

2 Hutchinson on Carriers, Section 714.

This distinction is clearly set forth in paragraph five on the back of the bill-of-lading in question, to which attention of the Court is particularly called.

Printed Record, page 74.

This distinction is important in determining the construction to be placed upon the stipulation in question.

The only reason for holding such stipulations to be valid at all is the severity of the common law rule as to the liability of carriers while goods are in transit. This is the basis of the right of railroad companies to limit their liability, and such right does not depend at all upon the rules affecting their liability as warehouseman.

In view of such well-recognized distinction between the obligations of railroad companies as carriers and as warehousemen, it was held in New Hampshire that the statute making a railroad company in that state liable for all damage to property along its right of way, caused by its locomotives, did not render it liable for freight which had been carried by it and placed in storage in its warehouse, which was burned by sparks from the engine without its fault.

Welch vs. Railway Company, 68 N. H., 266.

If provisions increasing the liability of carriers while goods are in transit are not to be applied after the transportation, neither should provisions limiting liability during transit have such application.

The rule is that all such limitations are to be strictly construed against the carriers.

4 Elliott on Contracts, Section 3221.

And such exemption will not extend beyond the express language of the contract.

Amory Mfg. Co. vs. Railway Company, 89 Tex., 419.

Nicholas vs. Railway Company, 89 N. Y., 370.

In accordance with this rule of construction, it was held in a case where the bill-of-lading provided that the carrier should not be liable for loss while the goods were at depots, that this did not include the depot at destination.

E. O. Milling Co. vs. Transit Co., 122 Mo., 258.

In a case in Kansas, where the facts were substantially the same as in the case before the Court, it was held that a contract relating to reduction of liability during transit was not applicable, and did not afford the company protection where the goods were lost after they had been placed in its warehouse.

W. P. Railway Co. vs. Moyer, 40 Kan., 184.

A railroad company ceases to be common carrier and becomes a warehouseman, as a matter of law, when it has completed the duty of transportation and assumed the duty of warehouseman as a matter of fact.

Rice vs. Hart, 118 Mass., 201.

Where a bill-of-lading exempted the carrier from liability from acts of pilot master or seaman, it was held that this had no application after the goods were unloaded from the ship, but still in custody of the carrier.

Gleadill vs. Thomson, 56 N. Y., 194.

Where certain exceptions as to liability were included in the contract of affreightment, whether they should occur before or during the voyage, or at the port of discharge, it was held that this would apply only while the goods were in the possession of the carriers as such.

Tarbell vs. Shipping Company, 110 N. Y., 170-183.

Liability as bailee survives even where, by special contract the carrier has thrown off his liability as such, and the Courts of New York enforce such liability wher-

ever possible. In order to relieve against the same there must be a special agreement based upon an adequate consideration.

Wheeler vs. Company, 125 N. Y., 155-161.

And this is the general rule that where contracts limiting liability are recognized as being valid, there must be an adequate consideration for the same.

In the present case the Railway Company insists that the owner obtained a lower freight rate by reason of the stipulation, but this is a matter which related wholly to the carriage of the goods. The freight was earned by transporting the goods to Cleveland, Ohio, and the Railway Company was under obligation to do nothing more without further compensation. It is not contended or even suggested that the rate of compensation for storing the goods was in any way affected by the stipulation relating to their value, therefore if it were held that this stipulation was still applicable to the goods after they had reached destination there would be no consideration for such agreement, and the same would be invalid.

The decisions of the State Courts above cited appear sufficient to establish that under the general law the owner in this case was entitled to the value of his goods. But we are not without authority of the Federal Courts.

A similar question arose some time ago in the state of New Jersey. The Statute of that state provided that no railway company should, under any circumstances, be liable for loss or damage to any baggage or property belonging to any passenger, beyond the sum of Three Hundred ($300.00) Dollars, unless the excess in value was declared at the time.

3 Compiled Laws of N. J., page 4243.

While this law was in force a woman passenger lost her trunk under such circumstances that the carrier, if liable at all, was so liable as warehouseman, and in the ticket issued to her, the right to carry baggage was limited to one hundred and fifty pounds, and the company's responsibility therefor to One ($1.00) Dollar per pound, unless otherwise agreed, and in the suit brought by her for the loss of her trunk and contents she recovered Five Hundred, Twenty-eight and 23/100 ($528.23) Dollars, the Federal Court holding that she was bound neither by the law nor the stipulation in the ticket, because this affected only the liability of the company as carrier and not as warehouseman. And, although it was recognized that if the suit had been against the company as carrier, the limitation upon its liability would have been upheld and the recovery could not have been above Three Hundred ($300.00) Dollars, yet the company could not rely upon such stipulation being sued as warehouseman. It was held that the purpose of this statute was only to relieve carriers from their severe obligation as insurers, etc., and not to affect their liability for negligence as warehouseman.

Wiegand vs. Central Railway Company of N. J., 75 Federal, 370; Affirmed by the Court of Appeals, 79 Federal, 991.

Respectfully submitted,

JESSE. A. FENNER,
Attorney of Record for
Defendant in Error.

C. C. YOUNG,
CHAS. L. STOCKER,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1914.

———o———

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

———o———

ACKNOWLEDGMENT OF SERVICE OF NOTICE.

———o———

We hereby acknowledge receipt from Attorneys for Defendant in Error of a copy of the foregoing motions and brief, and have notice that on the 12th day of April, 1915, or as soon thereafter as the same is reached, application will be made to have such matters submitted for the consideration of the Supreme Court in accordance with the provisions of Rule Six.

FRANK L. LITTLETON,
E. A. FOOTE,
Attorney of Record for Plaintiff in Error.

Cleveland, O., March 6, 1915.

No. 229

In the Supreme Court of the United States

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

BRIEF.

FRANK L. LITTLETON,
Attorney of Record for Paintiff in Error.

EDWARD A. FOOTE,
On the Brief.

In the Supreme Court of the United States

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Plaintiff in Error,

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EDWARD DETTELBACH,
Defendant in Error.

BRIEF.

The motion to dismiss in this case is predicated upon the claim that no Federal question is presented.

In determining this question we understand this Court looks only to the regularity of the writ and the fact of jurisdiction.

Sparrow vs. Strong, 3 Wallace, 97, 105.
Hecker vs. Fowler, 1 Black, 95.
Minor vs. Tillotson, I How., 288.

This case comes into this court on writ of error to the Court of Appeals of Ohio, Eighth District. The facts upon which plaintiff in error bases its right to a review by this Court of the judgments of the State Courts are fully set forth in the petition for the writ of error. (Record, pp. 93-96.) Briefly stated these facts are:

Defendant in error shipped three boxes of so-called household goods from Denver, Colorado, to Cleveland, Ohio. The petition alleges that one of these boxes, containing valuable Navajo rugs and blankets, purchased

for the purpose of sale, was lost or stolen while in the possession of plaintiff in error in its depot at Cleveland, Ohio. The articles in question were received for transportation by The Chicago, Burlington and Quincy Railway Company at Denver, Colorado, under the terms of a certain bill of lading. This bill of lading provided (Record, p. 72):

> "It is mutually agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, *that every service to be performed hereunder* shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns."

At the request of the shipper that the articles be transported at the lowest cost, there was written upon the contract, and signed by "Langton Bros.", representing the defendant in error, the following clause (Record, p. 72):

> "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per cwt."

By reason of this declaration defendant in error secured the benefit of a lower freight rate.

Section 5 of the printed conditions, on the back of the bill of lading provides (Record, p. 74):

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only."

The articles shipped under the bill of lading were received by plaintiff in error as connecting carrier of The Chicago, Burlington and Quincy Railway Company under the provisions of said bill of lading. The three boxes arrived at Cleveland, their destination, and plaintiff in error claimed that immediately after their arrival, notice was sent to the consignee as given in the bill of lading. Defendant in error, however, insisted that no notice had ever been received.

While the articles were in the possession of plaintiff in error in its depot at Cleveland, the box in question was either lost or stolen. Defendant in error then brought suit to recover the value of the contents of this box, the weight of which was less than five hundred pounds, in the sum of Two Thousand Seven Hundred and Ninety-two ($2,792.00) Dollars, with interest, the petition alleging that said box was lost or stolen while in the possession of plaintiff in error as warehouseman. The answer of plaintiff in error admits that said box was so lost or stolen while held by it as warehouseman.

As a separate defense plaintiff in error averred (Record, pp. 6-8) that said box was received under the terms and provisions of the bill of lading hereinbefore referred to; that said contract stipulated that every service to be performed thereunder was subject to its terms and conditions; that by reason of the voluntary declaration that the value of the property did not exceed $10.00 per cwt., defendant in error was limited in any recovery to such value; that said limitation of value was voluntarily placed on said articles by the shipper, he being thereby accorded a lesser rate than would otherwise have been charged for the transportation of said articles, as provided for in the tariffs and classifications then in force and on the file; that to permit defendant in error to re-

cover any greater value for said articles than that stipulated in the bill of lading would be in violation of the provisions of the "Act to Regulate Commerce," passed February 4, 1887 (24 Stat. L., 379), and the various amendments thereof.

Upon the trial of the case, plaintiff in error objected to the introduction of testimony tending to establish a value greater than that stipulated (Record, pp. 17, 20, 21), and requested the court to charge the jury that no recovery could be had in excess of said value (Record, pp. 65, 66). Notwithstanding, said evidence was admitted and said instructions refused, and the court charged the jury that defendant in error might recover the fair market value of the articles claimed to have been lost (Record, p. 70). Upon these instructions the jury returned a verdict in favor of defendant in error in the sum of Three Thousand and Twenty-nine and 33-100 ($3,029.33) Dollars.

A motion for new trial based, among other things, upon the ground that said verdict was contrary to and in violation of said Federal Act and its amendments was overruled and judgment entered against plaintiff in error (Record, p. 12). The case was carried to the Court of Appeals on petition in error, in which it was alleged, among other things, that said judgment and verdict were contrary to and in violation of said Federal Acts (Record, pp. 79, 80). That court affirmed the judgment of the trial court (Record, p. 81). The Court of Appeals is the court of final jurisdiction in such cases, except upon leave granted by the Supreme Court of Ohio. Application was made to the Supreme Court for an order directing the Court of Appeals to certify the record, which was denied (Record, page 81).

A petition in error was also filed in that court, which, upon motion based upon the ground that that court was without jurisdiction to review the judgment of the Court of Appeals (Record, pp. 85, 86), was dismissed (Record, pp. 81, 82).

Thereafter plaintiff in error applied to this Court for a writ of error (Record, pp. 93-96) to said Court of Appeals for a review of said judgment, the petition for said writ being predicated upon the claim that by said judgment plaintiff in error was denied a right, privilege and immunity to which it was entitled under said Federal Acts. Said writ having been allowed, the case is now in this court (Record, pp. 97, 98).

The claim of defendant in error that no Federal question is involved is based upon the theory that the Federal Interstate Commerce Acts have no application, since the petition alleges and the answer admits that the articles in controversy were lost while in the possession of plaintiff in error, as warehouseman. As stated by counsel in his brief (p. 15):

> "The admission of plaintiff in error that the goods were lost while held by it in its capacity of warehouseman precluded it from asserting any Federal right."

This contention seems, as stated by counsel, to be based upon the theory that:

> "Congress has not yet legislated upon the subject of the liabilities of a warehouseman in such a case as this. And until it does the State laws will control."

The argument of counsel that Congress has not yet legislated upon the subject of the liability of the carrier as warehouseman seems to be predicated upon the claim that, under the Carmack Amendment of June 29, 1906 (34 Stat. L., 593), it has been held that the initial carrier is

not liable for loss of property when the shipment in question has reached destination, and is held by the carrier in its capacity as warehouseman.

It is true that this Court and various State Courts have, under that part of the Carmack Amendment making the initial carrier liable for loss or damage to goods in transit, limited that liability to loss or damage occurring to the shipment while in actual transportation. These decisions, however, are limited to the determination of that particular question and are not in point as to the existence of the Federal right and privilege which plaintiff in error insists the State Courts denied to it under said Federal Interstate Commerce Acts.

Plaintiff in error contends that since the shipment in controversy was an interstate shipment, the contract or bill of lading under which that interstate shipment was handled is governed as to its construction, operation and effect by the Federal Interstate Commerce Acts, and that by denying to plaintiff in error the benefit of the stipulation as to value in said contract, notwithstanding said articles at the time of the claimed loss were held by plaintiff in error as warehouseman, plaintiff in error was thereby denied a Federal right which it claimed under said Federal Statutes.

Plaintiff in error contends that the limitation of value as agreed upon in said contract was a valid and binding stipulation, and that under said Federal Interstate Commerce Acts defendant in error was precluded from recovering and plaintiff in error was prohibited from paying any sum in excess of said valuation so mutually agreed upon; that said valuation was based upon a valid consideration by way of reduction in freight rate and was a limitation upon the amount which defendant in error could lawfully recover, not only in event of loss or damage

in actual transit, but also while plaintiff in error was performing any service in relation to said property; that if said loss occurred while said goods were in its depot at Cleveland, plaintiff in error was then performing a service in connection with said property, which was specifically provided for under its terms.

That Congress has legislated with respect to the liabilities and duties of carriers while acting as warehousemen, so far as interstate shipments are concerned, is evident from an examination of the Interstate Commerce Acts.

Section 1 of the Act of February 4, 1887 (24 Stat. L., 379), provides: "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad" from one State or territory of the United States to another.

> "Provided, however, that the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage or handling of property wholly within one State, and not shipped to or from a foreign country, from or to any State or territory as aforesaid."

And this Section, as amended by the Act of January 29, 1906 (34 Stat. L., 584), further provides:

> "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage * * * and *all services in connection with the receipt*, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, *storage and handling of property transported* * * * all charges made for any services rendered or to be rendered in the transportation of passengers or property * * * as aforesaid, or in connection therewith, or for the receiving, delivering, *storage, or handling* of said property, shall be reasonable and just; and every unjust and unreasonable

charge for such service or any part thereof is prohibited and declared to be unlawful. * * *"

Section 2 of that Act of 1887 provides:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 6 of said Act, as amended March 2, 1889, and June 29, 1906 (25 Stat. L., 855), among other things, provides:

"That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by rail-

road, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they may be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

In construing these Sections, this Court, in Texas and Pacific Railway vs. Interstate Commerce Commission, 162 U. S., 197, 212, has said:

"Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that 'all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such

property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

The significance of this language, in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious."

Subsequent to that decision, Section 1 of the Act as passed in 1887, was amended as above quoted, so as to specifically provide that the term "transportation" should include every service which may be rendered in connection with the receiving, delivering, storage or handling of interstate property, thus removing any possible question as to the intention of Congress to legislate as to all matters pertaining to interstate shipments. In that connection this Court, in Adams Express Company vs. Croninger, 226 U. S., 491, at p. 505, said:

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. * * *

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would

be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liabilities thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

The argument of counsel that Congress has not legislated with reference to the subject of the liability of carriers as warehousemen is, therefore, without merit. It is conceded that the shipment in question was an interstate shipment; being such interstate shipment, every service in connection with it, including the service of warehouseman, was a service within the provisions of the Interstate Commerce Acts. It follows that the contract or bill of lading in question, being one with respect to interstate commerce, is subject to the provisions of said acts.

Plaintiff in error, in its defense, specially set up and claimed that said contract was one governed by the provisions of said Acts, and to be construed with reference thereto; that the service of warehouseman was one provided for by the terms and provisions of said contract; that the limitation of value therein agreed to by the terms of the contract covered every service to be performed thereunder, and that by reason thereof, under the provisions of said Acts, said agreed value was valid and binding and any recovery beyond the amount so agreed upon prohibited.

We insist this raises a Federal question.

In Adams Express Company vs. Croninger, supra, this Court sustained its jurisdiction to review the judgment of the State Court, which had denied to plaintiff in error the effect of a similar provision in its bill of lad-

ing, as to the amount of recovery in event of loss to a certain interstate shipment, and said, p. 499:

> "The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this Court jurisdiction. * * * The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce."

Again in Kansas Southern Railway vs. Carl, 227 U. S., 639, this Court said, p. 648:

> "As the shipment was interstate, the contract was controlled by the twentieth section of the act of Congress of June 29, 1906 * * * But it is said that upon the face of the contract of limitation here involved, it is an exemption from liability for negligence forbidden by the Carmack Amendment, and that the judgment should therefore be affirmed. That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule of law, and therefore, withdraw them from the influence of state regulation."

In Missouri, Kansas & Texas Railway Company vs. Harriman, 227 U. S., 657, in reviewing a decision of the State Court, denying to plaintiff in error the benefit of a similar stipulation in a contract for the carriage of live stock, this Court said, p. 672:

> "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a

contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation."

In Atchison, etc. Railway Company vs. Robinson, 233 U. S., 173, the court says, p. 180:

"It is thus seen that the defendant specially set up a defense under the Interstate Commerce Act, a Federal statute, which, if denied to him, was an adverse ruling of a Federal right which would warrant the bringing of the case to this court from the highest court of a state under former Sec. 709 of the Revised Statutes of the United States, now Sec. 237 of the Judicial Code. It is apparent from the foregoing statement that the Federal question now presented involves the ruling of the state court denying to the carrier the benefit of the Interstate Commerce Act, a compliance with which was set up in the amended answer and supported by testimony tending to show the truth of the allegations thereof.

That the effect of the Carmack Amendment to the Hepburn Act, Sec. 20, act of June 29, 1906, c. 3591, 34 Stat., 584, 593, was to give to the Federal jurisdiction control over interstate commerce and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce has been so recently and repeatedly decided in this court as to require now little more than a reference to some of the cases."

We submit that since the bill of lading or contract in question is one providing for transportation of interstate commerce, it is governed and controlled by the provisions of the Interstate Commerce Acts, and the refusal of the State Court to give effect to said Act in construing said contract is a denial of a right, privilege and immunity under a United States Statute, and gives to plain-

tiff in error the right to invoke the jurisdiction of this Court.

The statement of counsel that the action, as set forth in the petition is not based upon the bill of lading, but sounds in tort, in no way affects the existence of this Federal question.

It is conceded that the shipment was accepted at Denver, under the terms and provisions of the bill of lading, and that it was received by plaintiff in error under that contract. The bill of lading was in fact offered in evidence by defendant in error as part of his case, and is in evidence as "Plaintiff's Exhibit I" (Record, p. 43).

The second defense of plaintiff in error pleads this bill of lading as the contract under which it accepted the shipment, claiming that the stipulation as to value therein contained entered into and became part of the contract for every service, including that of warehouseman, to be performed by it thereunder, and that by the provisions of the Interstate Commerce Acts defendant in error was prohibited from recovering any sum in excess of said agreed value.

Even if this action did sound in tort, defendant in error could not, by so framing his action, preclude plaintiff in error from maintaining its defense based upon the contract, as one exclusively controlled by the provisions of the Interstate Commerce Acts. That defense, we insist, raises the Federal question here involved.

We respectfully submit, therefore, that the motion to dismiss is not well taken, and should be denied.

Motion to Affirm.

It is insisted that, even if the motion to dismiss be denied, that the motion to affirm should be granted because the Federal question presented is frivolous.

We understand that under the rules and decisions of this Court, a motion to affirm will not be entertained where there is no color for the motion to dismiss, unless the assignments of error on the merits are obviously and unquestionably frivolous, or it is patent the proceeding is prosecuted for delay merely, or where it is evident on the face of the record that the question on the merits is not open to possible contention, because it has been previously so specifically ruled on by this Court as to absolutely foreclose further contention on the subject.

It is not urged or claimed that the proceeding in error is merely for delay. It is said that the question presented is frivolous, because the sole matter for determination is the application of the provisions of the contract to the facts involved.

True, the question is as to the validity and effect of the provisions of the contract, but this question is not to be determined from the terms of the contract alone. The contract must be construed in the light of the provisions of the Interstate Commerce Acts, and when so construed, we insist, the stipulation in the bill of lading precludes defendant in error from recovering any sum in excess of the value therein agreed upon.

The precise question as to the binding effect of such stipulation when applied to the service of warehouseman, we believe, has not been decided by this Court, although in numerous cases the validity of such stipulation has been sustained when applied to loss in actual transportation.

This question, however, relates to the merits of the case, and we refrain from any discussion of it believing it has no place in the presentation of this motion. On the merits, we shall contend that under these decisions the stipulation as to valuation will be held to apply when the Railway Company is acting as warehouseman.

We respectfully submit, therefore, that the Federal question presented is not frivolous; that the particular Federal question here involved has never been decided by this Court; that there is no color to the motion to dismiss, and that the motion to affirm must, therefore, be denied.

Respectfully submitted,

FRANK L. LITTLETON,
Attorney of Record for Plaintiff in Error.

EDWARD A. FOOTE,
On the Brief.

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In the Supreme Court of the United States

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

EDWARD A. FOOTE,
FRANK L. LITTLETON,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

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ADDITIONAL BRIEF OF PLAINTIFF IN ERROR.

The brief of plaintiff in error on the motions to dismiss or affirm discussed only the question of jurisdiction. The case having been placed on the summary docket for hearing we respectfully submit this supplemental brief on the merits of the case.

The errors complained of in the record arise out of the refusal of the State Courts to give effect to the stipulation in the bill of lading declaring the value of the goods shipped thereunder to be not in excess of $10.00 per hundred weight. This stipulation is as follows (Record, p. 72):

> "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per hundred weight."

The errors complained of are:

1. In permitting plaintiff below to introduce testimony tending to show that the value of the goods claimed to be lost was in excess of that stipulated (Record, pp. 17, 20, 21, 22).

2. In refusing to charge the jury as requested by defendant below that recovery could not exceed the agreed value.

These requests were asked at the conclusion of the evidence and before argument and are as follows (Record, pp. 65, 66).

> "Even if the jury find for plaintiff in this case the amount of such verdict shall not exceed the sum of ten dollars ($10.00) per hundred weight of the goods claimed by plaintiff to have been lost and included in the shipment covered by the bill of lading in evidence in this case.
>
> In no event can the jury in this case find for plaintiff in a greater sum than $10.00 for each one hundred pounds of the weight of the goods shipped by plaintiff under the bill of lading, 'Plaintiff's Exhibit 1', from Denver, Colorado, to Cleveland, Ohio, part of which are claimed by plaintiff to have been lost."

3. In charging the jury that plaintiff could recover an amount in excess of said agreed value. In this connection the court said (Record, p. 67):

> "The second defense is a statement of certain matters with the bill of lading and certain matters of law with reference to the value of the goods and the result of the second defense as pleaded is to the effect that if the plaintiff would be entitled to recover in this action at all, he would be only entitled to recover the value of $10.00 per hundred weight of these goods; that defense the Court has already disposed of in your presence, I think, by simply holding that the measure of damage would be other than that stated, which I will undertake to state to you later."

And again (Record, p. 70):

> "Now, if you find for the plaintiff under these instructions and under the evidence in the case, then I say to you that the plaintiff will be entitled to recover the fair market value of such goods, with interest from the time they should have been delivered to plaintiff; plaintiff states in his petition that was the

1st of November, 1911; I will leave that stand as the date; there is some little controversy here, 6th of November, I think he was there and didn't get the goods. So that as I have said, if you find for the plaintiff, you will ascertain from the testimony in the case the fair market value of the goods that were lost or not recovered by him from the Company and allow interest on it from the 1st of November, 1911, up to the first day of this term of court, which was the 2nd day of April, 1913."

These errors were urged in the State Court of Appeals as grounds for reversal and were overruled by that court; they are included in the assignment of errors in this court (Record, pp. 93-96).

The sole question involved is, as to the scope and effect of the stipulation in question. Its validity is conceded. It is claimed, however, that it has no application in this case because the loss for which recovery is sought occurred while the goods shipped under the bill of lading were held by plaintiff in error at its depot in Cleveland, Ohio, pending delivery, when plaintiff in error was acting in the capacity of warehouseman. The question becomes, therefore, one of construction and interpretation of the terms and conditions of the bill of lading.

Since this bill of lading was issued for an interstate shipment, as required by the Carmack Amendment, all questions as to the validity, scope and effect of the stipulations therein contained are matters exclusively within the Federal jurisdiction and are questions, therefore, for the final determination of this Court.

Missouri, Kansas & Texas R. R. Co. vs. Harriman, 227 U. S., 657.

Kansas City & Southern R. R. Co. vs. Carl, 227 U. S., 639.

Atchison, T. & S. F. R. R. Co. vs. Robinson, 233 U. S., 173.

Conceding the validity of the stipulation and that the only question involved is as to its scope and effect, it

is contended that defendant in error is not bound thereby as to any loss occurring while the goods are held by the carrier as warehouseman.

It is argued that the stipulation is valid only because based upon a reduced freight rate, that this freight rate consideration has reference solely to actual transportation and, therefore, the stipulation applies only to loss or damage occurring in actual transit. It is said it has no application to loss occurring while the goods are held by the carrier as warehouseman, since that is a distinct and different service, and the stipulation to be effective and binding as to such service must be supported by a separate consideration by way of reduced storage charges.

This argument that the stipulation has such limited application is not predicated upon anything contained in the bill of lading. It, in fact, wholly ignores the specific provisions of the contract.

We insist that in order to determine the applicability of the stipulation regard must be had, not only to the language of the particular stipulation, but to the other pertinent terms and provisions of the contract, an examination and consideration of which is necessary to a proper determination of the question.

Referring to the bill of lading we find that it is specifically provided therein (Record, p. 72):

> "It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, **that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained** (including conditions on back thereof) and which are agreed to by the shipper and accepted for himself and his assigns."

Provision is also made in the contract for the service of warehouse man as follows (Record, p. 74):

"Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The limitation as to the amount of recovery is contained in Sec. 3 on the back of the bill of lading (Record, p. 74):

"The amount of loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, **unless a value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.**"

It will be seen from an examination of these provisions that the declaration as to value is an integral part of the contract. Every service to be performed under the contract, is by its terms performed subject to all of the conditions whether written or printed therein contained.

The agreement as to value being part of the contract cannot be enforced for some purposes and disregarded as to others. The warehouseman service, a service specifically provided for by the contract, is performed subject to that provision of the contract containing the agreement as to value, as well as to such other terms and con-

ditions of the contract as may be pertinent and applicable.

The condition in Section 3 of the contract that in event of agreement as to value recovery for loss or damage to goods shipped thereunder shall not be in excess of the amount so agreed upon, **is in no way limited to loss or damage occurring during transit, but is for any loss or damage occurring during the performance of any service under the contract for which the carrier may be liable.**

It has been urged that because the first paragraph of the bill of lading recites: "It is mutually agreed as to each **carrier,**" etc., that the use of the word **"carrier"** limits the subsequent clause "every service to be performed hereunder" to services performed by the carrier strictly in that capacity.

We submit the contract is not susceptible of such narrow construction. An examination of the contract discloses that the word "carrier" is used throughout as synonymous with **"railway company"** and not in any technical sense. It is descriptive of the individual, not of the character of its liability.

Referring to the contract we find it is provided in Section 1, in referring to the service of warehouseman, that the **"carrier's"** liability shall be that of warehouseman only.

Again, in Section 5, in authorizing the storage of goods, it is provided "they may be kept in car, depot, or place of delivery of the **carrier** or warehouseman, subject to a reasonable charge for storage and to **carrier's** responsibility as warehouseman only; or may be, at the option of the **carrier,** removed to or stored in a public or licensed warehouse."

Again, in Section 3, providing for the filing of claims for loss or damage, it is stipulated that they must be

made in writing **"to the carrier"**, and unless so made **"the carrier"** shall not be liable. **And this applies to all claims howsoever arising.**

We submit, therefore, that there is nothing in the use of the word **"carrier"** in the contract which in any way supports the argument that the agreement as to value is limited to loss or damage sustained while the railway company is acting in its strict capacity as common carrier.

It is further urged that because the carrier, when acting as warehouseman, is authorized to collect storage charges in addition to the freight rate, that service is removed from the operation of the agreement as to value. This argument, however, ignores the fact that the reduced freight rate is the consideration for the entire contract. It requires no additional consideration by way of reduced charges to make the agreement as to value effective as to such service. The valuation was declared by the shipper for the express purpose of obtaining a reduced freight rate. The consideration for the giving of such reduced rate was the acceptance by the shipper of the uniform bill of lading issued by the carrier in such cases, as required by the Carmack Amendment. Upon such declaration being made the carrier was bound to grant the reduced rate provided for in its tariffs and classification (Record, p. 49) and to issue its bill of lading. The shipper was likewise required to accept the terms and conditions of the uniform bill of lading, issued by the carrier in such cases, and is bound by the terms and conditions therein contained. The bill of lading recites on its face (Record, p. 72), that it is the "Uniform Bill of Lading —Standard Form of Straight Bill of Lading approved by the Interstate Commerce Commission, by Order No. 787, June 27, 1908."

The shipper having voluntarily declared the value of the goods to be shipped and having accepted the uniform

bill of lading issued in such cases, which bill of lading provides that the value so declared shall limit the amount of any recovery for any loss or damage to the property while any carrier is performing any service with respect thereto, is thereby estopped from claiming any other value in event of loss during the performance of any service contemplated by the contract.

And this estoppel exists for all purposes of the contract. The voluntary declaration as to value is not a separate clause limited in its application to mere transit, but is for all purposes of the contract. So long as the carrier is performing any service with respect to the property it has a right to rely upon the value of the goods being as thus declared and agreed upon and the shipper is estopped from claiming any greater value in the event of loss in the performance of such service.

The service of warehouseman is clearly part of the contract and within the contemplation of the parties as a possible service to be performed thereunder and the shipper is not relieved from the application thereto of the agreement as to value because the carrier is, by the terms of the contract, entitled to charge a sum in addition to the freight rate for such service. In performing that service the carrier had as much right to rely upon the declared value as it did in actual transportation, and the shipper is no less estopped from claiming a greater value in such case than he would be if loss occurred while the railway company was acting in its strict capacity as common carrier.

The degree of care and liability which the railway company agreed to assume under the contract for every service which the parties contemplated might be performed thereunder, was based upon the value declared and agreed upon therein. The railway company had just as much right to assume that the value of the property

was as thus fixed in the care which it assumed with respect thereto when acting as warehouseman as when acting in its strict capacity as carrier, and the shipper is in either case estopped from claiming any greater value.

The fact that the action may be brought in tort and not on the contract is immaterial. The contract was offered in evidence by plaintiff below as part of his case. It is conceded that the goods were received and handled by the railway company as connecting carrier under that contract. It being so conceded the provisions of that contract govern the rights of the parties and must be enforced. The shipper cannot relieve himself from the obligations thereof or deny the railway company its benefits by bringing his action in tort.

The doctrine of estoppel is clearly applicable in this case, since it is admitted that the declaration of value was made by the authorized agent of plaintiff below for the express purpose of securing the benefit of the reduced rate.

It is stipulated in the record (p. 43) that Langton Brothers, who signed the declaration of value, acted for plaintiff below in making such declaration. The testimony of William A. Langton, who brought the goods to the depot and signed the valuation clause, is as follows (Record, p. 37):

"Q. Now, did Mr. Barner instruct you to ship said boxes by freight?

A. He did.

Q. Did he give you that instruction in writing?

A. Verbal.

Q. State what he said in giving you these instructions?

A. He said to me to take those three boxes and ship them to his mother, and ship them to the best advantage, pay the freight, bring him the bill of lading, and he would pay me.

Q. Best of advantage to whom, Mr. Langton?

A. The cheapest way I could ship them.

Q. Did you follow out his instructions?
A. I did.
Q. I hand you defendant's Exhibit No. 1, which is the original bill of lading under which the shipment in question moved. I will ask you if the signature 'Langton Bros.' is in your handwriting.
A. It is.
Q. Did you sign it?
A. I did." * * *

(Record, page 39):

"Q. Did you state to Mr. Barner that you had shipped the said three boxes to Mrs. Dettelbach under released valuation bill of lading?
A. I did.
Q. What did he say?
A. I don't know as he said anything, only he hollered about the freight being so much. I told him I had to release them to get that rate.
Q. Did you tell him the boxes were shipped at the released valuation rate?
A. I did.
Q. Do you know what the rate would have been had they gone at the value other than the released value?
A. One and a half times first class.
Q. Was it because Mr. Barnes authorized you to ship these three boxes to Mrs. Dettelbach as cheap as possible that you shipped it under the released valuation rate?
A. Yes, sir.
Q. And was it because of said instructions that you signed said bill of lading, Exhibit No. 1, certifying that the property shipped under the bill of lading does not exceed in value ten dollars ($10.00) per hundred?
A. Yes, sir."

We respectfully submit, therefore, that by the terms of the bill of lading every service to be performed under it is specifically made subject to all of the conditions therein contained. One service contemplated by the parties and provided for in the contract is that of warehouseman. One of the conditions of the contract is the

agreement that the value of the goods does not exceed ten dollars per hundred weight. It follows that the service of warehouseman is performed subject to that condition as to value.

As is said by this Court in the Carl case:

> "To permit such a declared valuation to be overthrown by evidence *aliunde* the contract for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by law. Such result would neither be just nor conducive to sound morals or wise policies."

We have been unable to find in the decisions of this Court or elsewhere any adjudication of the precise question involved in this case.

A case analogous in principle is Armstrong vs. Ry. Co., 53 Minn., 183. In that case the contract for shipment of stock provided that no claim for loss or damage should be valid unless made in thirty days.

After the shipment reached destination the Railway company retained possession of the stock for a few days for non-payment of freight. Action was brought for negligence in the care of the stock while held at destination. The Railway Company interposed as a defense the provisions of the contract limiting the time for filing claim. In the course of the opinion it is said:

> "It is contended that the sixth clause of the contract above recited is to be construed as referring only to claims for damages on account of some neglect or fault of the defendant in respect to its duties as **carrier** as distinguished from those of a warehouseman, after the completion of the transportation, and hence that it is inapplicable to this case. Such a construction cannot be given to the contract under the circumstances here presented. So far as it appears, defendant's retention of the property after it reached

its destination was rightful, because of the non-payment of its charges for freight. The retention was properly incident to the contract for transportation and there is no good reason why this sixth provision of the contract should be deemed inapplicable for the protection of the carrier in respect to the ordinary and incidental duties of warehouseman, which rested upon it when its duties as a carrier ceased."

This case is cited with approval in Hutchinson on Carriers (3rd Ed.), Sec. 446, where the author says:

> "The retention of the goods in the capacity as warehouseman is an incident to the contract for their transportation and the stipulation will not be deemed inapplicable in respect to the ordinary and incidental duties of a warehouseman, which may rest upon him after his duties as a carrier have ceased."

If the stipulation limiting the time for filing claims for loss or damage is applicable to the warehouseman's service, certainly a stipulation as to the value of articles shipped under a bill of lading, which provides that every service thereunder shall be performed subject to its conditions, is applicable to the service of warehouseman when the contract specifically provides for that service.

II.

The Cases Cited by Counsel for Defendant in Error Are Not in Point.

None of the cases cited by counsel for defendant in error are in point. In none of them was there involved an agreement as to value. They are all cases in which there was under consideration a clause **exempting** the carrier from liability. Such **exemptions** have ordinarily been strictly construed against the carrier, but this is not true as to such a stipulation as is here involved. Such stipulations are to be reasonably construed. As is said by this Court in Hart vs. Pa. R. R. Co., 112 U. S., 331-340:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

In the case of Gleadill vs. Thomas, 56 N. Y., 194, the Court was construing a provision in the bill of lading of a water carrier, exempting the carrier from liability "for any act, negligence, or default whatsoever of the pilot-master or mariners," and the Court held that the carrier was only entitled to exemption under that clause while the goods were on the ship in the courage of the voyage.

So also in Wheeler vs. Oceanic Steamship Co., 125 N. Y., 155, the clause under consideration was a provision in the bill of lading providing:

> "The master and owner of such ship and vessel shall not be liable in any form or manner."

The Court construing that stipulation held that it was not broad enough to relieve the carrier from liability while acting as bailee after the goods arrived at destination.

In E. O. Milling Co. vs. Transit Co., 112 Mo., 258, the clause under consideration was a provision in the bill

of lading providing "damages incident to railroad transportation, loss or damage by fire or the elements while at depot is excepted." The court held that this stipulation, especially when taken in connection with the words "damage incident to railroad transportation," did not include the depot to which the flour was to be shipped, but only depots at which the flour might be stopped while en route to New York.

In Armory Mfg. Co. vs. Ry. Co., 89 Tex., 419, the stipulation under consideration was:

> "Neither this company nor any of the said carriers while in transit or while in depot or place of transshipment or of landing or place of delivery shall be liable for loss or damage to hay, hemp, cotton, etc."

The suit was for loss of cotton by fire while held on the platform at point of shipment. The court held that the cotton while on the platform was not in transit or at a depot or place of transshipment within the terms of the stipulation.

The case of Wiegand vs. Central Ry. Co. of N. Y., 75 N. Y., 370, much relied upon by counsel, was an action brought by a passenger to recover for loss of baggage held by the railway company at destination in its capacity as warehouseman. The railway company invoked as a defense the provisions of the New Jersey Statute, which limited the liability of common carriers for loss of baggage to a specified amount. Construing that statute the court held that it referred only to the liability of the common carrier as such, and therefore, was not applicable to loss while baggage was held by the carrier as warehouseman.

There was in that case a stipulation on the ticket that the company's responsibility was limited to one dollar per pound, but the court held that that stipulation was

of no avail to the company in the absence of evidence that the attention of plaintiff had been called to it.

The case of Union Pacific Ry. Co. vs. Moyer, 40 Kan., 184, referred to in the opinion of the state Court of Appeals as sustaining the conclusion reached by that court, upon examination will be found to be inapplicable to the facts involved in this case. The action was one for loss by fire to certain goods, which at the time of the fire were in the possession of the railway company in its capacity as warehouseman. The facts show that the consignee had demanded the goods and that the railway company had refused to deliver them, claiming that they were not in its possession. Recovery was sought for the value of the goods based upon this refusal to deliver, and the railway company sought to avoid liability by offering in evidence the bill of lading under which the shipper released the railway company from any liability. In sustaining the action of the trial court in excluding this contract, the court said:

> "The evidence shows that at the time the goods were shipped the rate of freight was agreed upon, the money paid, and a receipt was given for the goods which contained on its back certain limitations exempting the company from liability as common carrier and certain other liabilities. This receipt was offered in evidence and the court refused to permit it. In this we see no error. This contract was one made for the benefit of the company and connecting lines in the shipment of goods, **and related to the goods directing such transit and while in their hands as common carriers.** There is no question in this case but that the goods reached their destination. The receipt and contract was for their conveyance from Rising Sun, Ohio, to Clyde, Kansas, **and limited the liability of the Company as common carrier** when the goods should reach the latter point. The receipt and contract, then, had spent its force when the goods reached Clyde. It becomes immaterial then what the contract was in relation to the shipment of these goods."

It is evident from this opinion of the court that the provisions of the contract under which the railway company claimed exemption related exclusively to liability of the railway company as common carrier and had no relation to the duties of the company as warehouseman.

Respectfully submitted,

EDWARD A. FOOTE,
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Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

No. 229, October Term, 1915.

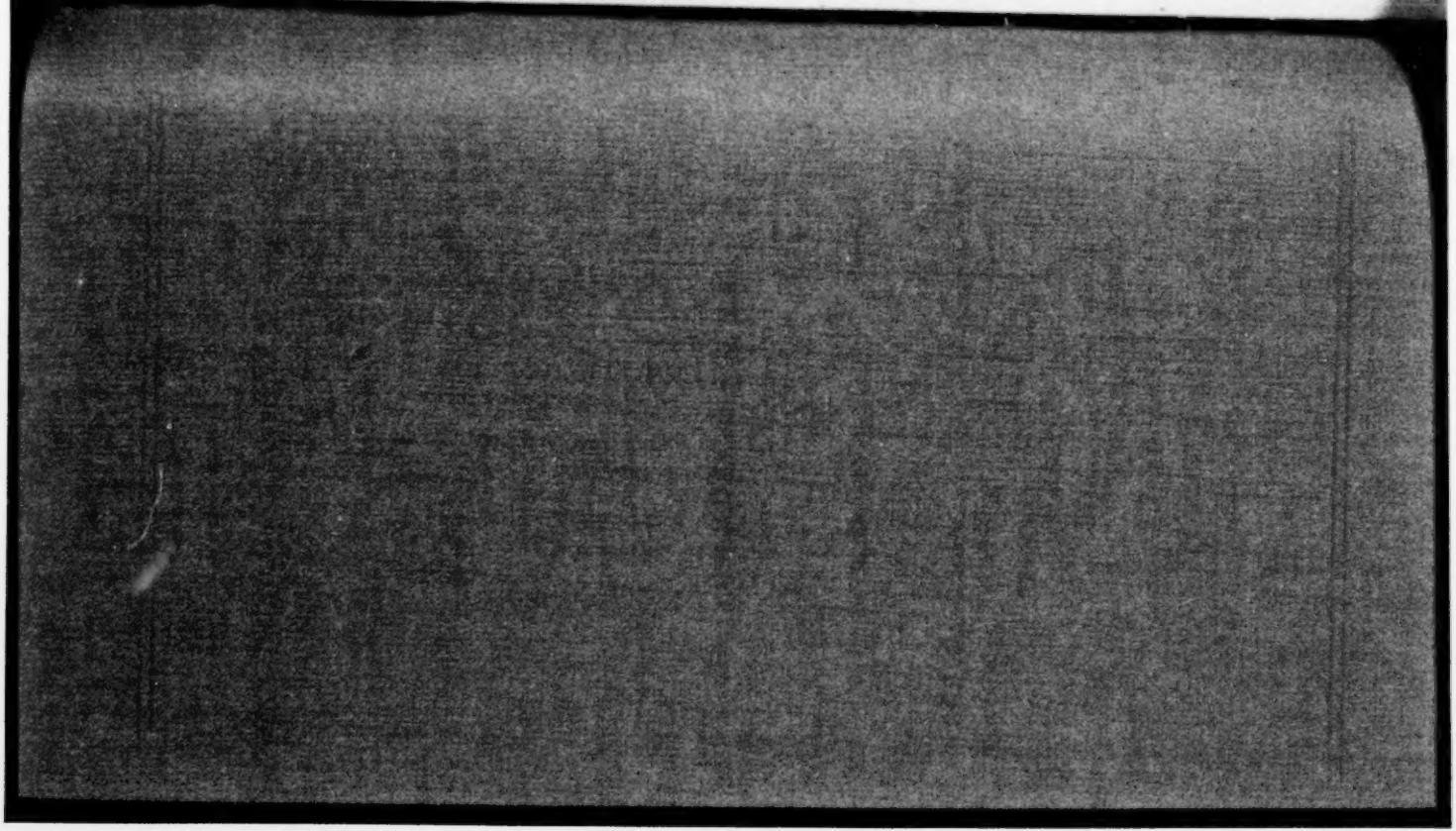
THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

EDWARD DETTELBACH,
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

C. C. YOUNG,
JESSE A. FENNER,
Attorneys of Record for Defendant in Error.



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REPLY BRIEF FOR DEFENDANT IN ERROR.

THE QUESTION OF JURISDICTION.

In their first brief filed here, relating to the question of jurisdiction of this Court, counsel for plaintiff in error set forth various sections of the Interstate Commerce Acts, and also quote from decisions of this Court in an effort to show that Congress has legislated with respect to the liabilities and duties of common carriers while acting as warehousemen in connection with interstate shipments, calling attention particularly to the words "storage" and "handling of property", as used in the sections referred to.

But it is evident from the language of these sections and the purpose of the act to regulate Interstate Commerce, that the storage and other services referred to therein are only such as are incident to the carriage of goods, as for instance, where storage is necessary after goods have reached the destination of one carrier, and before delivery to the connecting carrier. The storage and handling regulated by Congress is in connection

with interstate traffic, and the act evidences no intention on the part of Congress to regulate the conduct of either the shipper or consignee after goods have reached their destination and are stored in a warehouse, and have thus lost their character of interstate shipments. Congress has not attempted to regulate even the carriage of goods wholly within a state. In the section of the act relating to the issuing by the initial carrier of a receipt or bill-of-lading, it is provided that such initial carrier "shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass." It is further provided "that the common carrier, railroad or transportation company issuing such receipt or bill-of-lading shall be entitled to recover from the common carrier, railroad or transportation company, on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to pay to the owners of such property, etc." This language indicates that the contract between the shipper and carrier, which is so regulated, is one relating to the carriage of goods, and that the losses referred to are those which occur on the lines of transportation and while the goods are in transit. No mention is made in the act of warehouseman, and no attempt made to regulate their conduct.

In the present case, after the goods had reached their destination at Cleveland, Ohio, and had been held for the consignee for forty-eight (48) hours, and were then stored by the plaintiff in error because not claimed, they no longer constituted an interstate shipment. If they had been promptly called for and delivered to the consignee that would have been the last act of the carrier in respect to the transportation of these goods, and not

being so promptly claimed, and therefore placed in storage, that disposition of the goods was the final act in their transportation, and they passed out of the control of the Railroad Company as carrier as effectually as if they had been promptly delivered to the consignee.

On page eight of their brief counsel for plaintiff in error concede that this Court and various state courts have held that the Carmack Amendment does not have the effect of rendering the initial carrier liable for goods lost by the negligence of a connecting carrier after such goods have reached destination and are held in warehouse, and counsel, of course, make no question as to the validity of these decisions, but suggest that they do not have application in this case. But we submit when it is conceded that the defendant in error had no remedy against The Chicago, Burlington and Quincy Railway Company, the initial carrier, because the contract between them was fully performed by carriage of the goods safely to Cleveland, Ohio, and placing them in a warehouse, that such concession is decisive of the question of jurisdiction of this Court, and fatal to the position of plaintiff in error. And this necessarily follows from the decisions of this Court in construing the sections referred to.

> "The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act."
>
> "Under the Carmack Amendment an interstate carrier comes under liability not only for its own default, but also for loss and damage upon the line of any connecting carrier. And a stipulation for limitation of liability, if unauthorized as to the initial carrier is ineffective also as to a connecting carrier, and if valid as to the initial carrier, is valid also as to a connecting carrier."
>
> Kansas Southern Railway Co. vs. Carl, 227 U. S., 639.

"Under the Carmack Amendment to the Interstate Commerce Act the initial carrier is as principal, liable not only for its own negligence, but that of any agency which it may use, although as between themselves the carrier actually causing the loss may be primarily liable."

Atlantic Coast Line vs. Riverside Mills, 219 U. S., 186.

Applying these principles to the present case, it appears that if the goods in question had been lost in Interstate Commerce by plaintiff in error the initial carrier would have been liable to the owner for such loss because due to the negligence of its agent, but it being conceded and established by the holdings of this Court and many state courts that the initial carrier is not so liable, it necessarily follows that the goods were not lost in Interstate Commerce, and that plaintiff in error has not been deprived of any Federal right.

Surely the warehouse of plaintiff in error, in which the goods in question had been stored several weeks before loss, was not related to Interstate Commerce in any greater sense than wharves are so related, in regard to which this Court has held as follows:

"Although wharves are related to commerce and navigation as aids and conveniences, yet being local in their nature, and requiring special regulations at particular places, the jurisdiction and control thereof in the absence of congressional legislation on the subject properly belong to the states in which they are situated."

Transportation Co. vs. Parkersburg, 107 U. S., 692.
Minnesota Rate Cases, 230 U. S., 405.

II.

Upon the merits of the controversy between the parties, as disclosed by the record of the proceedings in the State Court, it is, of course, unnecessary to repeat the citation of authorities in our former brief, some of which have been commented upon by opposing counsel in their additional brief.

It is suggested that none of these authorities are in point because the limitation of liability considered in them was not based upon an agreement as to value.

But the question involved being one of construction of the release clause in the bill-of-lading, called by counsel an agreement as to value, we submit that the principles established in cases involving similar agreements for limitation of liability are important upon the question whether they survive the transportation of the goods. And, as we have previously shown, the decisions have been uniform, that they do not apply in case of loss occurring after the goods have reached destination and are held by the transportation company as warehouseman. The measure of damages for loss in such cases is the actual value of the goods, and not any reduced or limited value used as the basis of determining the freight rate.

And it is significant that counsel for plaintiff in error cite only one authority, being the case of

Armstrong vs. Railway Co., 53 Minn., 183,

in support of their theory, and this is a case relating to the time of bringing suit, and not the measure of damages, the court appearing to base its opinion that the retention of the goods by the carrier as bailee was in that case incident to the contract of transportation upon the fact that it had a lien upon them for unpaid freight charges, and therefore the limitation as to time of bringing an action was held applicable in a suit against the

carrier as warehouseman. In our case the carrier had no lien for freight charges, which had been paid in advance. Record, page 73.

On page sixteen of their additional brief counsel comment upon the important case of Wiegand vs. Railway Company, referring to it as a New York case, while in fact it is a Federal case, passed upon by both the Circuit Court and Court of Appeals, and reported in

75 Fed. Rep. 370 and 79 Fed. Rep., 991.

It is contended that the word "carrier" is used in some instances in the bill-of-lading in question to mean railway company, and that therefore the construction we insist upon is narrow. But in the body of the bill-of-lading, Record, page 72, in which the services to be rendered are set forth, appears the following: "which the Chicago, Burlington and Quincy Railroad Company agrees to carry to its usual place of delivery at said **destination**, if on its road, otherwise to deliver to another carrier on the route to **destination.**"

This language does not include any services to be rendered after destination has been reached, and is followed by the words quoted by counsel on page six of their brief, setting forth the mutual agreement as to each carrier over all or any portion of the route to **destination.**

The purpose to exclude from the contract any services after or beyond destination is apparent, and is made more fully to appear by paragraph five of the bill-of-lading, providing that property not removed for forty-eight (48) hours after notice of arrival may be kept in car depot or warehouse subject to reasonable storage charges, and to carrier's responsibility as warehouseman only.

That is the liability of the carrier for the shipment, and the right of the shipper to have it carried and protected under the agreement end after destination has

been reached and notice given, the contract having been performed, and thereafter a new relation exists between them not covered by the contract, but excepted from it.

Again in paragraph two of the bill-of-lading it is stipulated that in issuing the bill-of-lading the Company agrees to transport only over its own line, and that no carrier is liable for loss not occurring on its road, or after the property is delivered to the connecting carrier, except as otherwise provided by law.

From all of which it clearly appears that the initial carrier issued and intended to issue such a bill-of-lading, in the usual form, as is required by the Interstate Commerce Act, relating solely to the carriage of the goods, and not by such contract assuming for itself, or imposing upon connecting carriers any obligations beyond the transporting of the goods to destination. And in arriving at the intention of the parties in making such a contract it is proper and necessary to consider the well known and well understood difference between the degree of care required by carriers when acting as such and when acting as warehousemen, the acts of Congress regulating interstate traffic with a view to promoting uniform freight rates, and the decisions of the Federal and State Courts relating to the operation and effect of such stipulations for limitation of liability as contained in the bill-of-lading in question. And in view of these considerations and the relation and position of the parties, and the subject matter of the contract, we submit that the construction of the release clause contended for by plaintiff in error is not the true construction.

RELEASE CLAUSE RELATES ONLY TO GOODS IN TRANSIT.

This stipulation as to the value is part of the contract between the initial carrier and the shipper, which, by its terms, is made applicable to and binding upon the plaintiff in error as connecting carrier, and therefore fixes the measure of recovery for loss of goods in an action by the owner against either or both of the carriers, as well as in an action by the initial carrier against the connecting carrier to be reimbursed for loss or injury to the goods by it for which the former is held liable. And such agreement as to value as well as to the other stipulations in the contract must be equally and uniformly binding upon each of the three parties so concerned in the carriage of the goods. Therefore, for any loss sustained by the owner by reason of breach of the terms of this contract by the connecting carrier, he can recover against either one of the carriers the stipulated damages. But as we have already seen, for the loss of goods from the warehouse under the circumstances existing in this case, the initial carrier is not liable at all. While three parties were concerned in the carriage of the goods, only two were affected by the negligence resulting in their loss.

Therefore such loss is not to be compensated by any of the provisions of the contract, and the contract is not applicable to it. We believe there is no escape from this conclusion.

And referring again to the authorities, we call attention to the great reluctance of courts generally to permit common carriers to relieve themselves by contract from the ordinary consequences of their own negligence. This is well illustrated by a recent case in New York, being a case where the shipper obtained a lower freight rate by reason of a stipulation as to value in the

bill-of-lading. The goods were injured by the negligence of the carrier while in transit. And by the lower court and a majority of the Court of Appeals it was considered that while such agreed valuation would control so far as the liability of the carrier as an insurer of the goods was concerned, yet when the same were injured by reason of its negligence it should be held liable as a bailee for hire for the full value of the property.

Bermel vs. N. Y. Ry. Co., 70 N. Y. Supp., 804. Affirmed in 172 N. Y., 639.

In Moore on Carriers, Volume 1, Page 498, this distinction, based on the New York decisions, is stated as follows:

> "But where a bill-of-lading limited the liability of a carrier simply as a carrier of goods, its liability as a bailee for hire remained unimpaired, so that, though it was not liable as a carrier, beyond the amount named in the contract, it was liable as bailee for the full value of the goods when negligently injured."

And in another recent New York case where there was an agreed valuation as the basis of the freight rate, and the shipper, while the goods were still in transit, notified the carrier to stop them, which through its proper agent, it promised to do, but failed to do so, and delivered them in accordance with the bill-of-lading, the Court of Appeals of New York held unanimously that the shipper should recover his full loss, and that the limited valuation was under the circumstances inapplicable and ineffectual, a majority of the Court holding that the notice to stop was effectual to constitute the carrier from that time a bailee for hire, and that the damages of the shipper were referable to its tortious act, and that the action was founded upon the same and not upon the contract.

Rosenthal vs. Weir, 170 N. Y., 148.

If such reasoning is tenable at all, surely the wrongful acts of plaintiff in error in allowing the goods in question to be lost or stolen from its warehouse under the circumstances shown by the record should properly be held as giving rise to an action in tort, not controlled by the contract.

PLAINTIFF IN ERROR SHOULD PAY FULL COMPENSATION BY REASON OF ITS NEGLIGENCE.

And here we wish to call attention to the inexcusable lack of care on the part of plaintiff in error while the goods were so in its warehouse. Its attorneys in the State Court sought to escape all liability on the ground that it was required to exercise only ordinary care, and the court so instructed the jury. But the jury found that it failed to exercise even ordinary care.

Of the three boxes it allowed two of them to be opened up and the third to be removed.

Testimony of Plotz, Record, page 18.
Testimony of Dettelbach, page 25.

Andrews, in the employ of the Railway Company, and called as a witness by it, thought the missing box was taken by a colored man in the day time.

Record, pages 24, 52, 56 and 60.

Be this as it may, there was no evidence of any breaking into the warehouse or any other event beyond the control of the Company tending to excuse the loss of the goods by its negligence.

They had been placed in an unusual place in the warehouse by mistake.

Record, page 55.

This gross negligence of the plaintiff in error as warehouseman affords, therefore, another reason why it should not avail itself of the stipulation as to the value in order to reduce its damages. It was not in the contemplation of the shipper when this clause was inserted that any representative of the carrier would be guilty of such conduct. Failure to deliver property without lawful excuse is the same as a conversion of it.

Vanderbilt vs. Steamship Co., 215 Fed. Rep., 886.

And loss of goods by a wrong delivery, made negligently by the carrier, is a conversion for which the carrier is liable to account for the full value of the goods, this kind of loss not being within the terms of the special contract fixing a conventional value upon the goods at the time of shipment in consideration of the rate of freight being reduced.

Savannah Ry. Co. vs. Sloat, 93 Ga., 803.

And it is well established that in a suit for conversion, the wrong doer cannot take advantage of an agreed valuation of the property in order to limit the amount of the liability.

Georgia Southern Ry. Co. vs. Johnson, 121 Ga., 231.

This opinion was rendered by Justice Lamar, now of this Court.

See also:

Georgia F. & A. Ry. Co. vs. Blish Milling Co., 82 Southeastern Rep., 874.
St. Louis Ry. Co. vs. Wallace, 176 S. W. Rep., 764.
Shelton vs. Canadian Northern Ry. Co., 189 Fed. Rep., 153.

And where the bill-of-lading provided that the carrier should not be liable for loss by fire, and there was unreasonable delay on the part of the connecting carrier in forwarding the goods and the same were destroyed

by fire while in the transfer warehouse, the carrier was held liable for the loss.

Erie Ry. Co. vs. Star & Crescent Milling Co., 162 Fed. Rep., 879.

It appears, therefore, both as a result of proper reasoning and from the decisions that the judgment of the State Court was correct.

Respectfully submitted,

C. C. YOUNG,
JESSE A. FENNER,
Attorneys of Record for Defendant in Error

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY *v.* DETTLEBACH.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, STATE OF OHIO.

No. 229. Argued November 29, 1915.—Decided January 10, 1916.

The effect of an express contract, made for the purpose of interstate transportation, must be determined in the light of the Act to Regulate Commerce.

Whether the responsibility of an interstate carrier as warehouseman of goods carried from another State and not called for by the consignee until after the time specified in the bill of lading after arrival at destination is to be measured by the valuation in the bill of lading is a question Federal in its nature.

Under the Act to Regulate Commerce, as amended by the Hepburn Act of 1906, the term transportation embraces all services in connection with the shipment, including storage of goods after arrival at destination.

The valuation expressed in a bill of lading of goods shipped in interstate commerce, and a limitation of the liability of the carrier made by the shipper for the purpose of obtaining the lower of two rates of freight, is, under the Carmack Amendment, valid and binding upon the shipper, and applies not only to the responsibility of the railroad company as a carrier while the goods are in transit but also to its responsibility as a warehouseman while holding the goods in storage after arrival at destination and notice to the consignee.

THE facts, which involve the responsibility of a carrier for goods under the applicable provisions of the Interstate Commerce Act, and the Carmack Amendment thereto, are stated in the opinion.

Mr. Edward A. Foote, with whom *Mr. Frank L. Littleton* was on the brief, for plaintiff in error.

Mr. C. C. Young, with whom *Mr. Jesse A. Fenner* was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The court whose judgment we have here under review sustained a judgment rendered by an inferior state court in favor of Dettlebach and against the Railway Company for the market value of certain goods which, having been shipped in interstate commerce, were lost through the negligence of the Railway Company (the terminal carrier) while in its possession as warehouseman at the place of destination; overruling the contention that, because of a limitation of liability agreed upon by plaintiff's agent in consideration of a reduced rate of freight and contained in the bill of lading that was issued by the initial carrier, and by force of the provisions of the Interstate Commerce Act and its amendments, especially the Hepburn Act of 1906, the recovery ought to be limited in accordance with the stipulation. This question, it may be observed, as affecting the warehouseman's responsibility, was not passed upon in *Boston & Maine R. R.* v. *Hooker*, 233 U. S. 97, 109.

The facts are as follows: Dettlebach, the plaintiff, on September 18, 1911, shipped certain packages of merchandise, described as household goods, over the Chicago, Burlington & Quincy Railway and connecting lines from Denver, Colorado, consigned to his wife at Cleveland, Ohio. They were received for transportation under the terms of a bill of lading, prepared in the form approved and recommended by the Interstate Commerce Commission in its report of June 27, 1908 (14 I. C. C. 346, 352; 22 Annl. Rep. I. C. C. 1908, p. 57), which contained the following provision:

"It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, *that every service to be performed*

hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns."

Among the conditions printed upon the back were the following:

"SEC. 3. . . . The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property . . . at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence. . . ."

* * * * * * * *

"SEC. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only. . . ."

Upon the face of the bill of lading was the following declaration signed by plaintiff's agent: "I hereby declare the valuation of the property shipped under this bill of lading does not exceed $10.00 per cwt."

The court found as a fact that the shipper by consenting to the limitation received a consideration in the shape of a substantial reduction in the freight rate, and that this supported the agreement to limit the company's liability. No question was made but that the agreement was in accordance with the filed tariff.

The goods thus shipped were transported by the initial carrier to the junction between its line and that of defend-

ant, and transported by the latter company to destination, where they arrived on September 27. They were not called for by the consignee, and remained in defendant's possession as warehouseman until November 1, 1911, when, through its negligence, certain of the goods, of the market value of $2,792, were lost.

This action having been brought to recover the value of the goods lost, and the claim of Federal right already mentioned having been made and overruled, a verdict and judgment went against defendant for the market value of the goods, and this was affirmed by the Court of Appeals, Eighth District, State of Ohio. The Supreme Court of the State declined to review the judgment. The case comes here under § 237, Jud. Code.

It is no longer open to question that if the loss had occurred in the course of transportation upon defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing the lower of two rates of freight, would have been binding upon plaintiff, in view of the Carmack Amendment. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509; *Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 648, 654; *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 668. The question is, whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman. The Court of Appeals, recognizing the question as one of difficulty, reasoned thus:

"To occupy this twofold relation is of advantage to the company. As soon as the company can occupy it by replacing with it its former relation as a common carrier, it obtains the benefit of the rule of ordinary care instead of the higher degree of vigilance which the law charges upon carriers for hire. And the company is further advantaged by an early shifting of its status as carrier to that of warehouseman, through its right in the latter capacity to

charge for the storage of consigned goods, from the time when its relation to them as carrier ceases."

The court considered that the declaration of value stamped upon the bill of lading and signed by plaintiff's agent, carried no suggestion that it should inure to the advantage of a warehouseman after becoming inert for the relief of the carrier, and that the custody and protection of the goods as warehouseman is a distinct service from that of their transportation, and for it additional compensation may be charged; proceeding as follows: "The additional compensation is not at all diminished in this case because of the agreement of limitation of liability. The reduction in the rate of carriage which can be used as a consideration to support that agreement, is no consideration for a like limitation of the liability as warehouseman, because there is no reduction in warehousing charges provided or stipulated for in the transaction. It is not easy to see why the consideration—not a large one—which is permitted to support the agreement to a limited liability on the part of the carrier, should do double duty by serving also to uphold a like limitation of the liability of a warehouseman,—the latter not agreeing to abate any part of proper storage charges. To so extend the contract of release would give an advantage to the warehouseman, but none to the owner. To allow that consideration would be to permit the carrier to cast off his obligation as carrier and take up a lighter burden, while he denies to the shipper all right to share in the benefit of the changed relation. The rate which the warehouseman may charge for storage remains unaffected by the release of liability as a carrier. The warehouseman could collect the reasonable value of his service whether the limitation of the carrier's liability was or was not stipulated. He could not be compelled to take less because of the stipulation. He could collect no more if the stipulation had not been made."

We recognize the cogency of the reasoning from the

standpoint of the common-law responsibility of a railway company as carrier and as warehouseman. But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 672; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 180.

The provision that we have quoted from the contract is to the effect that "every service to be performed hereunder" is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within 48 hours after notice of arrival may be kept "subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only." Thus, "any loss or damage for which any carrier is liable" includes not merely the responsibility of carrier, strictly so called, but "carrier's responsibility as warehouseman" also.

And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term "transportation," (this, under the original act, included merely "all instruments of shipment or carriage") so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, deliv-

ery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling *of property transported;* and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith*, shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful."

From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods.

We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES took no part in the consideration or decision of this case.